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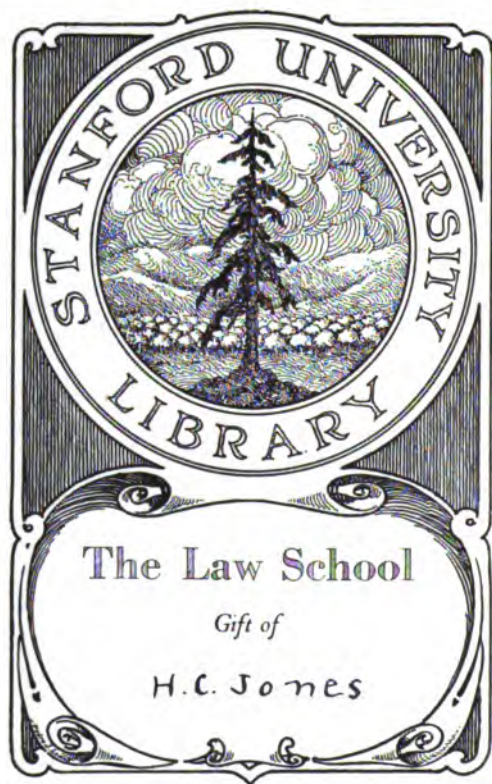
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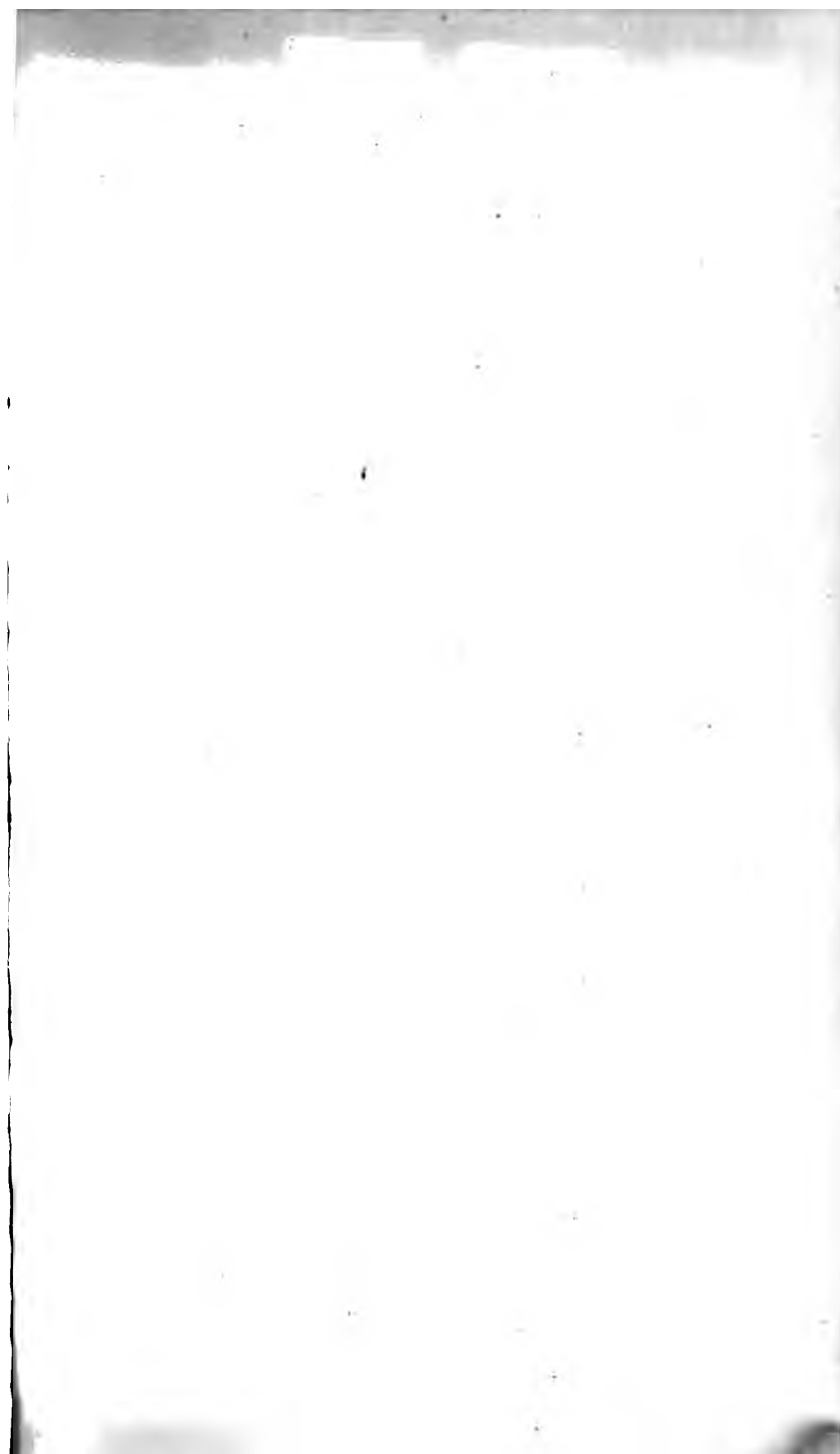
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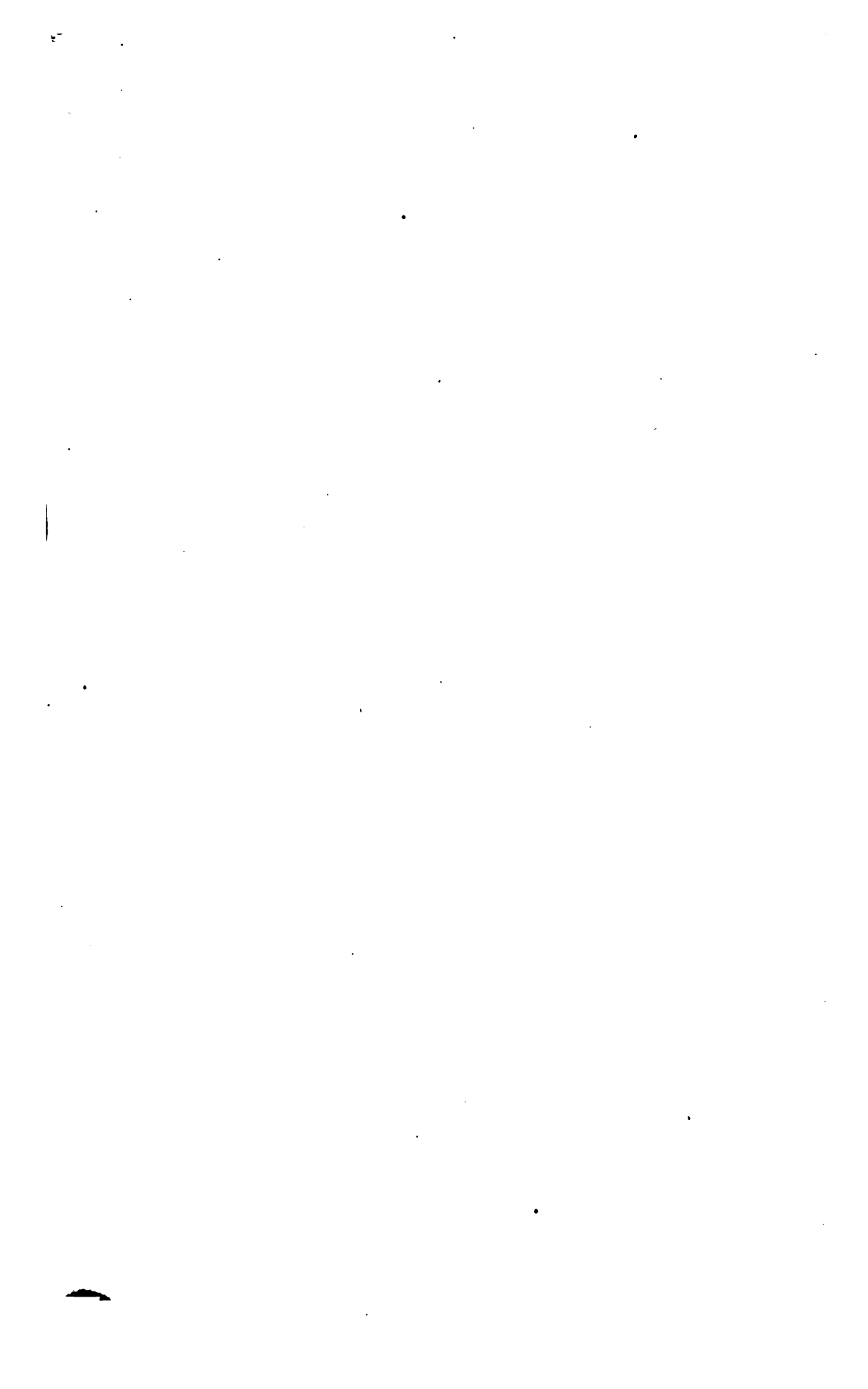
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A TREATISE
UPON SOME OF THE
GENERAL PRINCIPLES OF THE LAW,
WHETHER OF A
LEGAL, OR OF AN EQUITABLE NATURE,
INCLUDING THEIR
RELATIONS AND APPLICATION
TO
ACTIONS AND DEFENSES
IN GENERAL,
WHETHER IN
COURTS OF COMMON LAW, OR COURTS OF EQUITY;
AND EQUALLY ADAPTED TO
COURTS GOVERNED BY CODES.

By WILLIAM WAIT,
COUNSELLOR AT LAW.

VOLUME I.

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PREFACE.

At the present time no legal work is more desired than one which gives in a concise and accurate form those general principles of law and of equity which are recognized and enforced by the courts of the several States of the Union. It is familiar learning that these principles were most of them originally defined, declared and settled by the English courts, and were subsequently adopted by our courts, so far as they were adapted to our wants and our condition. In the older States, these principles have been extensively discussed, applied and enforced ; and in the States more recently created, the courts constantly consult the decisions of the courts of the older States. As a natural result, it is found that there is a remarkable harmony in the general principles of American law. There are discrepancies and contradictions, in some instances, between the decisions of different States, and statutes have also caused other differences between State laws. But notwithstanding these exceptional decisions or statutes, it may be regarded as settled that there is a great, uniform and settled system of American law.

To collect and present these principles in as extensive a manner as practicable, and to give as full illustrations of the rules, with their proper exceptions, qualifications and modifications, is the object of the present work. The cases cited will be taken indiscriminately from the English reports, from those of the United States courts, and from those of the several States. The value of authorities thus collected and arranged will be evident to every lawyer.

Every judge and every judicial officer, every member of the legal profession engaged in practice, and every student of the law constantly finds it necessary to examine the points decided by the courts. These decisions are sometimes read from the

reports themselves, and this is the preferable method when practicable, and when the reports at hand furnish the desired information. But when a new, an intricate and an important legal question arises, how unsatisfactory is the result of a search through such reports as are accessible to the greater portion of the profession! To obviate this difficulty, and to ascertain what has been adjudged upon such points, if the reports themselves cannot be had and examined, requires a resort to digests and to elementary or text-books. But even this method has its disadvantages, and is often quite unsatisfactory, since a complete set of digests, English and American, or a full set of elementary works upon all or even most of the titles of the law, will not often be found. To purchase all the reports, English and American, is beyond the means of most of the profession, and if they possessed the money, so large an investment in books would be most unprofitable, except in some very rare instances indeed. As a general thing, the profession have, therefore, been compelled to rely upon such text-books and digests as were accessible, and under existing circumstances, it was the most practicable, as well as the best thing that could be done. But if one desires to ascertain what has been adjudged in any or all of the English and American courts, and he purchases all the necessary digests for that purpose, the cost will be found to far exceed the general supposition of those who have not examined the matter. To settle this, it is only necessary to ascertain what is the lowest price of a complete set of the best English digests, of the United States digests, and of the digests of the several States. It is fortunate that there is a method by which this expense can be greatly reduced, and especially is this true in view of the rapid increase of the volumes of reports in this country and in England, and it is a fact which the profession may as well carefully consider, that even now it is not possible for most of them to know what has been decided by all these different courts, except through the aid of digests. And if this is so at the present time, how rapidly and surely will the difficulty increase! *In the future, the American lawyer must rely upon the general*

abridgments or digests for full information as to the decisions of the English and American courts. Every lawyer will see that this is unavoidable, and he will promptly avail himself of this resource, if offered in a desirable form. To examine all the cases decided upon a given point is seldom, if ever, necessary, because the same point has been adjudged again and again in the different courts of the same State, or of those of the several States, and even in the English courts. In such cases, all that is required is, to find a sufficient number of reliable authorities upon the point under examination. To secure this result, it is believed that an extensive, an accurate and a carefully selected collection of cases taken from all the reports, and illustrating all the prominent principles of the law, would meet the wants of the profession.

Every person who is at all conversant with the examination of legal questions, and the trial or argument of causes, knows that they must be founded upon contracts or arise from torts. The plan of this work is to discuss the entire subject of contracts and of torts. To do this properly requires a general division of these subjects, and a separate discussion of each subject by itself.

In every litigation it will be found that there is a right to be secured or protected, or a wrong to be redressed, and that the right of action arises from some kind of contract, or is founded upon some species of tort.

When a right is to be enforced, or a wrong is to be redressed through the aid of the courts, the remedy sought must be such as the courts have power to grant. These remedies have, for a great length of time, been divided into such as are legal or such as are equitable in their nature. Generally it may be said that courts of law administer the former, and courts of equity the latter kinds of remedies. In the present work, all these various remedies are considered and explained, but without discussing the rules of practice relating to them. This plan secures a full discussion of the right and of the remedy, and will be exhaustively treated.

In those States in which the common-law practice has been

retained, and the courts of equity are separately organized, this work will be as well adapted as though no code of procedure had ever been enacted. This is evident from the fact that the rights of action discussed are founded upon contracts or upon torts, and that the remedies, whether legal or equitable, although fully discussed, have still left the *mere practice* to other works.

From what has just been said, it will be evident that the rules here laid down can be as well enforced under a code as under a common-law and equity system of practice. In those particulars in which codes of procedure affect the general principles relating to contracts or torts, or those relating to remedies, whether legal or equitable, the changes in the law will be fully and carefully noted and explained.

Any general law work, written at the present day, must be founded upon the decisions of the English and the American courts. The extent and the variety of the subjects discussed by the English courts have always given them a value in this country, and they were never more important than at this time. On the other hand, the American courts are daily considering questions which are of the utmost importance, not only in the State where the questions arose, but equally so in all the other States in the Union. From this vast storehouse of judicial precedents it is easy to find authorities in support of every principle, and an inexhaustible variety of illustrations applying them to particular cases. The general rules which may be deduced from authorities so numerous and so reliable will be found to be generally recognized as sound law in all the American courts. If there are exceptional cases or rules, they will usually be familiar to the lawyer who is interested in the questions to be discussed.

When difficult questions of law are to be settled, the lawyer usually resorts to the best digests within his reach, and a full collection of digests, English and American, will be pretty certain to furnish the desired information. But there are very few such collections of digests, and they are quite expensive if possessed. *An effort is made in this work to meet the wants of the practitioner in most of the cases that will arise, and to furnish*

the information in a convenient form, at a moderate cost. The arrangement of the subjects, alphabetically, secures all the advantages of a digest, while the mode of presenting the principles avoids the repetitions unavoidable in all digests. This is a saving of both labor and expense. What the lawyer needs, is a work which contains nearly every important title in the law, and that each illustration of such a principle shall be sustained by reliable authorities. Such a collection of principles and authorities is equivalent to an elementary work upon every title of the law which is here furnished. It will be remembered that it is not necessary that all the reported cases should be cited; it will be sufficient to give a full variety of principles amply sustained by the authorities.

Every student is required to study some series of text-books. This work will answer every purpose of a text-book while pursuing his course of studies, and it will furnish information upon nearly all the titles of the law. But it will have a higher value still for him, because when he starts in the practice of his profession, this will be one of the first works needed by him, and he will be *entirely familiar with it*, and ready to put its principles into practice as cases may require it.

If every young lawyer had a full collection of English and American digests and text-books, he would have more information than can be given in a work like this. A moment's reflection will show the cost of so large a number of books. To obviate this difficulty, this work covers most of the titles in the digests, or the subjects discussed in most of the text-books; and the invariable rule is to present all of the important principles, fortified by a sufficient number of reliable authorities. *By doing this, the general rules of law or equity are furnished at a very moderate expense, and it may therefore be truly said that it furnishes the young lawyer with a working library.*

The skilled and successful veteran in the profession is familiar with much of the law, and may seldom be in doubt as to the true rule in any given case. But while all this may be conceded, he may be called upon by the court or by the opposing counsel to

furnish the authorities which sustain his position. This may sometimes be easily done, but there is no practitioner, however able, who does not sometimes find his equal, and who, at times, is not somewhat at a loss to meet the fully prepared points that are urged by experienced counsel against his position. Whenever this occurs, every available case is pressed into service, and this collection of authorities may sometimes prove of service, if examined and used. *In short, what the ablest lawyer wants is authorities to fortify such positions as he feels confident are correct in principle and established in law.*

It may be said, generally, that the whole business of the country is transacted under some form of contract, express or implied. There are sales, and hiring and letting of property. There are bargains for labor and services. There are bills and notes, bonds and mortgages and other evidences of debts or contracts. And these are but a few of the numerous instances that could be mentioned. And, to aid in an examination of the vast number of questions arising upon contract, most of the important titles of the law have been included in the plan. An examination of the volumes, as they are issued, is the true method of forming a correct opinion as to their value.

The number of actionable torts is very great, and the titles of the law relating to such actions are quite familiar to the profession. It is enough to say that this subject has received the most full and careful consideration.

The common-law forms of action have all been very fully discussed, and the latest authorities cited.

Suits for equitable relief are of daily occurrence, and are steadily increasing in importance. The entire subject will be found to have been fully treated.

Every available defense to an action at law is believed to be included in the part of this work devoted to defenses.

The changes in the law have rendered these defenses much more available than formerly. And it is now common to interpose, by way of equitable defense, matters that once would have been the subject for a bill in equity. This subject has received

the most full and careful attention, and will be found very useful to the practitioner.

The lawyer in active practice needs no work so much as one that will promptly and accurately answer the various and important questions that daily arise. Every question may be satisfactorily answered by taking time to examine it fully ; but time and the occasion are sometimes too pressing to permit extended investigations ; and it is then that a reliable and extensive collection of principles, methodically arranged, will render the most valuable assistance.

Every lawyer, of any experience, knows how often he is called upon to apply his legal learning to some case or question, and that, while he is clear as to the principle, he cannot, at the important moment, find such cases as he desires to establish it. Again, he may feel quite confident as to the true rule, and yet have doubts, so that he is unwilling to advise or to act without the light of the authorities. So, too, he may have an impression that the law is opposed to his side of the case, while the reverse is actually the fact, as examination proves. It is in these, and similar instances, that this work is designed to meet the wants of the practitioner. And while there is no claim that every question will be answered, it will be found that the information given is very great.

The perplexities of the office are generally quite sufficient ; but in the haste of the trial of an important cause, the most experienced lawyer is sometimes greatly in doubt. The continued changes in the aspect of the case, as the trial progresses, constantly present new and unexpected legal questions, which must be met at the moment. There is no adequate time for full examination, and the most hasty research is all that is possible ; in such a case, a full and a most carefully-arranged system of principles is invaluable.

This work has been written with this object constantly in view. And it is not merely in jury trials that it will be useful ; for, on trials before the court, before referees or arbitrators, or upon the

argument of legal questions at special or general terms, the authorities collected will be equally available.

From what has been said, it will be seen that the materials collected and arranged will serve as a ready-made brief upon a very great number and variety of questions.

As the plan of the work proposes to give the greatest number and variety of legal principles in the least practicable space, and arranged in the most systematic order, the convenience of the work is sufficiently evident. It will not be bulky, and, therefore, it may always be conveniently taken wherever it may be useful to the owner. By means of the general arrangement of the chapters, and of a full table of contents, as well as a complete index, any principle contained in the work may readily be found.

A comparison of this work with any other, or, indeed, with all others, is all that is required to determine whether it is not only much cheaper in a pecuniary point of view, but also to prove that it is equally useful in saving the time of the lawyer, which is often more valuable than money.

It is a general remark that the laws are constantly changing, and, in some respects, the assertion is true. But, while statutes change the rules of practice, pleadings and evidence, and sometimes the general rules of law, it will be found that *the great body of common-law and equity principles remain unchanged*, and that the bulk of them are, in their very nature, unchangeable. This proposition is self-evident to every experienced lawyer or judge. There may be, and there actually is, a constant application of legal or equitable principles to new cases, and the great mass of the English and American reports are nothing more than cases to which settled legal and equitable rules were applied to particular facts and circumstances, either separately or in combination. The reports are really nothing more than illustrations of the application of such principles.

Of course it is not intended to say that there are no new cases; for new inventions and improvements, as well as the great changes in society, may sometimes require the creation of a new rule, and even here it will be found that the application of an old

and well-settled principle to the same facts or circumstances is usually all that is required. The importance and the advantage of this permanence of principle is, *that a work which is accurately written will be reliable for a long time in all its general features, and while new cases will continue to add new illustrations of the rules, they will not overturn or impair those already established.* One of the most striking proofs of this fact is found in the constantly increasing volumes of "Leading Cases," many of which are among the oldest adjudications. They are simply old rules with new illustrations and occasional modifications. It is the aim of this work to select and furnish the largest practicable collection of important and well-settled principles, so that they may be permanently relied on, and at the same time to furnish the largest variety of useful illustrations.

A collection of principles which have been settled by the different courts of the several States cannot fail to extend the acquaintance of the reader with reference to the adjudications of these courts. Such a comparison increases the general knowledge of the student, and greatly aids the lawyer and the judge in dealing with questions presented for settlement. The constant, the important and the intimate business relations existing between the citizens of the different States require, and they will ultimately accomplish a very general harmony in all legal and equitable rules relating to commercial transactions. The tendency is toward harmony of decisions in the several States. The constant reference to other State authorities, and the careful examinations of the grounds upon which they are founded, tend to give strength to, as well as uniformity in, all American decisions.

The English authorities have so long held an important place in our jurisprudence, that they will not be likely to be overlooked. But there has never been a time when they were so nearly like our own laws as at the present day. It is not now uncommon to find American authorities cited in the opinions of English judges; but it shows the general tendency toward uni-

formity in the establishment of general legal and equitable principles. No American work, upon general principles, can properly omit due reference to so valuable illustrations as may be found in the English decisions. And they have accordingly been resorted to, in many cases, as additional authority upon new or important points. *The more extensive the proper research, the more reliable the conclusion as to the true rule to be followed.*

The increasing importance and the growing influence of the decisions of the United States courts have been very generally observed. In some cases they are obligatory, and in others their influence is limited to their value as expositions of general principles, and the reason upon which they are founded. It is quite evident, however, that their effect is to consolidate and harmonize the decisions of the courts of the several States. A mere allusion to this subject is sufficient to show the importance of including many of these decisions in any general legal work.

This work is submitted to the profession in the belief that it will be found useful to the student, the lawyer and the judge.

ALBANY, Nov. 21st, 1876.

WILLIAM WAIT.

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PART I.

OF ACTIONS AND DEFENSES.

IN WHICH THEY ARE CONSIDERED GENERALLY, AND
IN THEIR RELATIONS TO REMEDIES, WHETHER OF
A LEGAL, OR OF AN EQUITABLE NATURE; OR
WHETHER FOUNDED UPON CONTRACTS, OR UPON
TORTS; UPON LEGAL DUTIES, OR UPON EQUITIES.

CHAPTER I.

OF RIGHTS AND REMEDIES, AND OF THE NATURE
OF ACTIONS.

TITLE I.

OF CONTRACTS AND OF TORTS.

ARTICLE I.

OF RIGHTS OF PERSON AND OF PROPERTY IN GENERAL.

Section 1. Some general considerations. Every person has an interest in the laws and the remedies which exist for the protection of person, and of property. The rights of *natural persons* are either *absolute*, and such as relate to life, limb, liberty, health, or reputation; or, they are *relative*, and such as pertain to the relations of husband and wife, parent and child, guardian and ward, or master and servant, and the like instances.

There are also rights of *artificial persons*, such as corporations, joint-stock companies, or other similar organizations.

In addition to those just mentioned, there are rights of *property*, whether it be of a *corporeal*, or of an *incorporeal* nature; and whether it consists of *real*, or of *personal* property.

The rights of persons are generally considered as the gift of God; and, are regarded as inalienable, unless they are forfeited by some act of the person, in violation of the laws under which

he lives; or, unless he voluntarily consents to some act, or enters into some contract, or relation, which affects, changes, or deprives him of the right to insist upon them; or, in other words, unless he binds himself by contract to do, or to omit some act or thing; or estops himself from claiming and insisting upon such natural rights.

In declaring, defining, and securing these rights of person, and of property, the talents, time, and labor, of the ablest and best men have been employed. The Constitution of the United States; and, the Constitutions of the several States, all furnish the most clear and conclusive proof of the wisdom and justice of the plan, and of the deep and permanent interest which has been felt and exhibited by every class of citizens, in every part of the Union. In addition to these constitutional guarantees, there are extensive systems of statutes relating to the same rights. There are statutes of the United States, as well as those of every State, which have for their object, the security of rights, and the redress of wrongs; and, they are intended to provide for the protection of every right, and the redress of every wrong, so far as that can be accomplished by human laws, whether written or unwritten.

It may be said, generally, that all civil actions are founded upon some act, or some omission in regard to private rights or duties, in relation to person or to property. So, too, it may be said, in a general way, that acts or omissions are actionable, or not actionable, according to the circumstances under which they take place. The act of loading and discharging a gun or a pistol, may be, of itself, an innocent and lawful act; and it may sometimes be an actual duty, as in the case of a soldier engaged in battle. But, the act of discharging a gun or a pistol in a public street, in a large city, where serious injury may result from the act, and where such act is in violation of a general law, or of some valid ordinance of the city, may be unlawful, and actionable under the circumstances of the case. Again, it is presumptively unlawful for one person to injure or to kill another, and yet the act when done in necessary defense of life may be lawful and justifiable; and in some extraordinary cases, the act may be not merely lawful, but may be considered a duty imposed by the law, as where a soldier in battle kills an enemy, or a sheriff executes a murderer in pursuance of the sentence of the law and of the court.

The motives with which an act is done is sometimes made the

test whether the act is actionable; and at other times the motive merely affects the question of damages; and in still other cases, the motive, however bad it may be, does not give a right of action for doing what is clearly a lawful act. Words spoken, may be actionable or otherwise, according to the circumstances and the motives which call for or prompted their utterance. A witness in a cause, counsel in the trial of an action, or a person called upon as to the character of a servant, may honestly and fairly discharge the duties imposed by the situation in which he is placed, without liability to an action; while the same words if uttered without cause, under circumstances which did not call upon the party to speak, and especially, if maliciously uttered, may subject the speaker to an action. There may be acts too, which are done from humane and good motives, but they are in violation of the legal rights of another, and are therefore actionable. One man cannot lawfully punish another man's child, merely because he richly deserves it; and the cases are very numerous upon the point that honest or good motives are no justification for an unlawful act. So, too, the cases are numerous that a lawful act does not furnish a ground of action, however bad or malicious the motive which prompted the act. This whole subject will be fully illustrated under the title Injuries not Actionable.

In a work like the present, it is not possible to discuss all the important and various questions which relate to rights and remedies, either as to person or as to property; and, therefore, for the purpose of a convenient division of the subject, the work will be limited to those rights, duties, or liabilities, which are founded upon contracts, upon torts, upon legal duties, or upon equities.

§ 2. *Of contracts in general.* In relation to the importance of a knowledge of the law of contracts, no proof or argument will be required, since its value is seen, and its necessity felt, in all the business transactions of life. In the intercourse among men, there are buyers and sellers, lenders and borrowers, employers and employed; those who let, and those who hire; those who insure, and those who are insured; and, yet, these are but a few of the illustrations of the extent and variety of contracts, express or implied. In all such cases, it is unwise and unsafe to contract obligations, or to incur liabilities, of the nature or extent of which the contracting party is entirely ignorant, or, at best, but partially informed. To aid in

the acquisition of a competent general knowledge of the subject, is the object of the present work.

The law of contracts is a universal one, which is adapted to all times and all civilized races, and to all places and circumstances, because it is founded upon those great and fundamental principles of right and wrong, which are immutable and eternal, and which present a striking uniformity among all nations, whatever seas or mountains may separate them, or however many ages may have elapsed between the periods of their existence. The law of contracts may very properly be regarded as one of the foundations of human society. Every phase of social life assumes its existence; for out of contracts, express or implied, grow many, if not most, of the rights, duties and obligations of persons toward each other. The law of contracts is, therefore, important, from its declaring and defining the rights and duties which arise from contracts. But it is chiefly valuable for the means or power which it furnishes, with the aid of the law, for the enforcement of contracts; or the securing of the remedies which are given by law for a breach of them.

§ 3. *Of torts in general.* Torts may, and frequently do, occur, independently of any contract; but they may also be founded upon or grow out of some violation of a right created or secured by contract. Torts are as numerous and as various, as the ingenuity, the experience or the malice of mankind can devise, or carry into effect. And for this reason, the law does not limit the remedies which may be employed for the protection of rights, or the redress of wrongs. To show this in the strongest and clearest light, it is only necessary to refer to the maxim, "*Ubi jus ibi remedium*," or "There is no wrong without a remedy," Broom's Leg. Max. 191; and in the course of this work numerous illustrations will be furnished. And since torts are infinitely various, it would be an endless task, as well as a useless effort, to attempt an enumeration, or a description of all the wrongs of which the law takes cognizance, and for which redress is afforded by restraint or prevention, or by compensation in damages for the injury sustained. It is sufficient to say that injuries and wrongs are constantly occurring, and that civil actions for their redress are numerous enough to occupy a fair share of the attention of the legal profession and of the courts. The injuries referred to are such as relate to person or to property, in whatever manner such injury may occur. Every wrongful invasion of a legal right, such as the right to security of person,

the rights of property, or the rights incident to the possession of property is, in law, an actionable tort; and so of every neglect of a legal duty, and of every wrongful injury to the person, or character of another. The law of torts or civil wrongs, therefore, having for its object the security of our persons, and character, and the protection of our property, is a branch of the law of general interest and importance, and there are few persons to whom some knowledge of it does not become essential, at some time, for the purpose of securing or protecting themselves in their just and lawful rights, or for the purpose of ascertaining the nature and extent of their legal duties or responsibilities.

The table of contents, and the index will furnish a reference to the numerous instances in which actionable torts are discussed in this work. In continuation of the matter in hand, the next subject for consideration will be the nature of the common law, and of equities, as well as the discussion of some of the general principles relating to actions or defenses.

TITLE II.

OF THE NATURE OF ACTIONS.

ARTICLE I.

OF THE NECESSITY FOR ACTIONS, AND OF THEIR ORIGIN.

Section 1. Of laws; their nature and objects. In every condition of civilized society there must be some customs, rules, or principles, by which rights may be investigated, duties or liabilities declared, controversies determined; and remedies enforced.

Among the advantages to be derived from entering into society are those of protection of person, and the security of property; and, therefore, men have a right, and they are in some degree compelled, to apply to the public authorities for redress when rights are withheld, or injuries have been committed.

The natural right of individuals to redress wrongs, or to take the law into their own hands, cannot exist in a well-organized state of society, except in a few instances; and the general rule is, that all rights must be declared, and all remedies enforced by the proper tribunals in accordance with settled principles and the forms of law.

The elements or principles of a system of laws may be comparatively simple in form, and few in number, when considered with reference to their origin in an early stage of society ; but, as the wants of society increase, the system will expand until it extends to and includes every case which, according to justice, and the public interest, requires consideration.

It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more so by judicial exposition ; so that, when, in a course of judicial proceeding, by tribunals of the highest authority, the general rule has been modified, limited and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases, under like circumstances.

The effect of this expansive and comprehensive character of the common law is, that while it has its foundations in the principles of equity, natural justice, and that general convenience which is public policy ; although these general considerations would be too vague and uncertain for practical purposes, in the various and complicated cases, of daily occurrence, in the business of an active community ; yet the rules of the common law, so far as cases have arisen, and practices actually grown up, are rendered, in a good degree, precise and certain, for practical purposes, by usage and judicial precedent. Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances.

The consequence of this state of the law is, that, when a new

practice or a new course of business arises, the rights and duties of parties are not without a law to govern them ; the general considerations of reason, justice, and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations, to the new circumstances. If these are such as give rise to controversy and litigation, they soon, like previous cases, come to be settled by judicial exposition, and the principles thus settled, soon come to have the effect of precise and practical rules. *Norway Plains Co. v. Boston and Maine Railroad*, 1 Gray, 263, 267, 268 ; *Bell v. The State*, 1 Swan. (Tenn.) 42 ; *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R., 9 Exch. 222, 223 ; S. C., 10 Eng. Rep. 394, 395.

With the advancing state of society, new questions are constantly arising for decision, and the courts adapt the practice and course of proceedings to the existing condition of things, instead of adhering to forms and rules which were established under different circumstances ; and they do not decline the enforcement of rights or the administration of justice, because there is no remedy according to the old forms or rules. *Wallworth v. Holt*, 4 Mylne & Craig, 635.

The principle upon which the courts proceed is, that the common law does not mould the habits, the manners, and the transactions of mankind to inflexible rules, but adapts itself to the business and the circumstances of the times, and keeps pace with the improvements of the age. *Lyle v. Richards*, 9 Serg. & Rawle, 351.

Our system of common-law rules and of equitable principles consists of the accumulations of several centuries, as is entirely evident, when it is remembered that so much of our law is derived from that of England. So extensive, so complicated, so useful, and so practical a system could not be the work of one man, nor of one nation, nor even of one age. Its vast collection of adjudged cases is the growth of centuries ; and, from a comparatively small number of decisions in the early times, the number has constantly increased, and the system of jurisprudence has expanded from time to time as the constantly recurring demands of men have presented questions to the tribunals for decision, until the result has been the establishment of a system of legal and equitable jurisprudence which is adequate to the demands or the necessities of a great commercial nation.

In the construction of this system, the courts were constantly in the habit of applying to new combinations of circumstances

those rules of law which were to be found in judicial precedents, or in works treating of legal principles; and for the sake of attaining uniformity, consistency, and certainty, those rules or principles, unless clearly unreasonable, or inconsistent, were applied in all cases as they arose. But, notwithstanding the great number and variety of decisions, there always have been, and there are now, cases constantly occurring which are new in principle, or of first impression. So, too, there are cases, which, though not new in principle, yet present questions which have never been determined. In all such cases, the courts avail themselves of the vast collections of principles which have been settled as law, and then from the analogies of the law, and the reason and justice of the case, they decide in such manner as will best subserve the rights of the parties, and the public interests, if such decision should be followed as a precedent. Where the common law does not give a right of action for a tort, the court cannot supply the defect and furnish a remedy. *Osborn v. Gillett*, L. R., 8 Exch. 88, 97; 42 L. J. Exch. 53; 21 W. R. 409; 28 L. T. (N. S.) 197.

In addition to the decisions of the courts, the legislature has enacted a vast system of statute law, in relation to rights and remedies. It is from this extensive system of legal and equitable jurisprudence, and from the various statutes of the States, that a knowledge of the practice of the courts is to be obtained. And while engaged in the study of that practice, it will be constantly borne in mind, that many of its rules are statutory enactments, instead of being principles established by the decisions of the courts. Yet, whenever the statute has not provided a rule, the courts are at liberty to resort to the decisions, for materials to supply the defect.

In the creation or establishment of laws, it is the province of the legislature to determine what is best for the public good, and to provide for it by proper enactments. The province of the judge is to expound the law, instead of making it. The written law he is to ascertain from the statutes; and the unwritten law he is to find in the decisions of his predecessors, and of the existing courts, or from the text-writers of acknowledged authority, and upon the principles which are clearly to be deduced from them by sound reason and just inference. The distinction between legal and equitable rights will continue to exist, although a statute abolishes the distinction between actions at law and suits

in equity so far as the forms of procedure are concerned. *Matthews v. McPherson*, 65 N. C. 189.

Although a code abolishes all forms of action, the principles by which the different forms of action were previously governed will still remain, and will control in determining the rights of the parties to an action. *Eldridge v. Adams*, 54 Barb. 417; *Hubbell v. Sibley*, 50 N. Y. (5 Sick.) 468, 472; *Paul v. Parshall*, 14 Abb. (N. S.) 138, 142; *Dunphy v. Kleinsmith*, 11 Wall. (U. S.) 510.

§ 2. Nature and definition of actions. Whenever a person believes that he is about to be injured by the act of another, or when he feels that an injury has already been done, he will naturally adopt the most effective means of preventing or removing the injury, or of redressing the wrong committed; and on the other hand, the party against whom the claim is made will desire to know whether he can successfully resist the demand, and by what means; and, for these purposes, each party, whether complainant or defendant, must, with or without the aid of legal advisers, carefully consider the law affecting the asserted right, and the nature of the injury or offense, and the remedies or punishments, before any steps can properly be taken, whether precautionary, offensive or defensive, or the result may be a serious error by which he may become a wrong-doer, or may lose all means of redress, or may waive a good defense in consequence of his injudicious proceedings or omissions.

The general nature of an action is thus explained by an elegant writer on the laws and constitution of England: "A person (let us suppose) who has a cause of action, either in a right detained, or an injury done, is determined to bring his action; and, by his attorney, takes out *process* against the party complained of; in consequence of which the party complained of (whom we call the defendant), either puts in common or special *bail*, as the case requires. The defendant being thus secured, the plaintiff *declares*, in proper form, the nature of his case. The defendant answers this declaration; and the charge and defense, by due course of *pleading*, are brought to one or more plain simple facts. These facts, arising out of the pleadings, and thence called *issues*, come next to be tried by a jury. The jury having heard the *evidence* upon the issue before them find (we will suppose) a *verdict* for the plaintiff. On that verdict, a *judgment* is afterward entered. The plaintiff's *costs* of suit are then taxed, by the officer of the court, and the judgment is put in *execution*, by levying on the defendant's effects the damages given by the jury, and the costs allowed

by the court ; which being done, there is an end of the suit, and both parties are once more out of court."

The explanation just given relates to an action at law, and in some respects it differs from a description of a suit in equity, yet it serves to point out the essential features of all civil actions.

The most general division of actions is usually that of civil and criminal, but since the latter kind of action does not come within the scope of this work, no notice will be taken of that subject. See Code, §§ 4, 5, 7.

Civil actions have heretofore been divided into legal, and equitable; the former being such as are cognizable by courts of law, and the latter such as are peculiar to the jurisdiction of courts of equity. In this State (N. Y.), there are no separate courts of law and of equity, and all remedies, legal or equitable, are administered by the same courts or judges, according to the circumstances of the particular case, although the mode of procedure may differ according to the relief or remedy desired.

A civil action is a legal prosecution, in an appropriate court, by a party complainant, against a party defendant, to obtain the judgment of that court in relation to some right claimed to be secured, or some remedy claimed to be given, by law, to the party complaining. In every civil action, legally prosecuted, there must be a court having jurisdiction, or it will not be an appropriate court; there must be a party complaining, who brings the action before that court; there must be a party who is charged with doing or omitting to do something, for which he is brought into court; and there must be a subject-matter of litigation; and, upon the whole case, the rights of the parties are to be determined by a decision or judgment of the court. See also the cases cited in 2 Wait's Law and Pract. 40; Wait's Code, § 2.

A civil action is one prosecuted for the establishment or recovery of a right, or the prevention of a wrong, or the redress of an injury. It may be instituted by governments, corporations or individuals, to enforce any remedy, or to obtain or secure any relief which the law gives to a complainant against a defendant.

The term "action" includes all the proceedings from its commencement to its termination; and, therefore, the proceeding is called an action until the rendition of the decision, decree or judgment; but it is not so called after that time.

A distinction is sometimes made by applying the term "action" to proceedings at law, and "suit" to those in equity; and the familiar expression is, "an action at law," or, "a suit in equity."

Didier v. Davison, 10 Paige, 515; S. C., 2 N. Y. Leg. Obs. 420; *People ex rel. Sanders v. Colborne*, 20 How. 378, 381, 382.

At the common law an action for the recovery of land, without damages, was called a *real action*.

An action for the recovery of some specific personal property, wrongfully withheld by the defendant from the plaintiff, or for a compensation in money for an injury sustained, which compensation is technically called damages, was called a *personal action*.

An action for the recovery of real estate and damages for its illegal detention was called a *mixed action*.

At common law, an *action ex contractu* is one which arises on contract, and is brought for the recovery of damages, or of a thing which belongs to the plaintiff. These actions were account, annuity, assumpsit, covenant, debt, and detinue.

A personal action, *ex delicto*, was for the redress of a wrong unconnected with contract, and the actions were case, trover, replevin and trespass.

A *local action* is one which must be brought in some particular locality, whether that place be fixed by common law or by statute.

A *transitory action* is one which may be brought in any county which the plaintiff may prefer.

An action *in personam* is one in which the proceedings are against the person in contradistinction to those against specific things or *in rem*. An action *in rem* is one instituted against the thing in contradistinction to personal actions, which are said to be *in personam*.

In this brief explanation of the nature of actions, the discussion has been limited to such matters as pertain to the practice, as distinguished from a study of the general rules of law, or the principles of equity. It must not, however, be supposed, that this omission rests upon the ground that the latter study is not deemed important. On the other hand, let the student at all times remember that his only hope of eminent success in his profession must be founded upon the possession of a profound, an accurate, and an available knowledge of all the general rules of the common law, and of the principles of equity.

TITLE III.

OF SOME OF THE PRINCIPAL DISTINCTIONS BETWEEN
LEGAL ACTIONS AND EQUITABLE SUITS.

ARTICLE I.

OF LEGAL ACTIONS.

Section 1. In general. Legal rules and principles must be expressed in general terms, and, therefore, it must sometimes happen that there are cases within the words but not within the reason or the spirit of the rule; while there are other cases within the meaning, but not within the words of it. The reason of this is evident on the slightest examination, since it will readily be conceded that it is impossible for any one to foresee or provide for the endless series of complicated occurrences which must take place in society. And, whenever a case occurs which does not fall within the provisions of the general rules, there is a defect to be supplied, or injustice must result from that cause. In many of these cases, courts of equity have devised and applied such rules as a reasonable and just man would have provided had he foreseen the circumstances of the case, and had he authority to establish a rule for it. In some cases the legislature have enacted laws designed to provide remedies or rules in which the common law was found to be deficient.

The remedies afforded by the common-law courts are limited by the rules of the common law, which, as a general thing, are fixed and unbending; and one of the settled maxims of that system is, that a decided point furnishes the rule for future similar cases. In addition to this, the character of the process, pleadings, mode of trial, and the judgment all tend to reduce the application of remedial justice to the enforcement of these fixed rules, instead of attempting to investigate the complicated equities which exist in so many cases, and in which no adequate relief is to be obtained except through equitable interference. From this general statement it will be seen that one of the distinguishing features of common-law remedies is, that they are usually unattainable except by the application of fixed, distinct rules, through the aid of a court, which seeks to apply and enforce these general rules to all cases, instead of investigating and

securing any peculiar equities which may exist in some particular case or class of cases.

This system, which may seem harsh in some of its aspects, has, nevertheless, one very valuable feature, and that is, it is admirably adapted to the important end of securing certainty and uniformity in the administration of the law, a result which is invaluable to a commercial people.

§ 2. **Legal actions relate to some act done or omitted.** It is the object of the law to give a remedy in every case which justly requires it. For this purpose the whole body of the law was created ; and every important right is so guarded by familiar and public laws that each person may know what those rights are, and what remedy is afforded for an invasion of them. Every person is bound to know the general rules of the law or to submit to the consequences resulting from his ignorance, or his infringement of them. He who wrongfully invades the possession of his neighbor must respond in damages corresponding to the injury done. So he who inexcusably breaks a valid contract must make good the loss which the other party sustains in consequence.

In these cases, it will be observed, the law does not interfere until after the wrongful act has been committed, and it then holds the wrong-doer accountable for the damages resulting from his acts. The whole remedy consists in compensation to the injured party by way of damages assessed against the party in the wrong. The coercive power of the law is limited in its influence upon the parties, by declaring that every violator of its principles must respond in such damages as may be legally assessed against him, and enforced against his property or his person. It is by virtue of this system that most wrongful acts are prevented, and most contracts are performed, for the remedy by way of damages is a most effective one when properly administered. Beyond this species of remedy, the common law does not, as a general rule, extend ; and, where a party would prevent the commission of a wrong, or would compel the specific performance of a contract, by means of the process of the courts, he must resort to a court of equity, where such remedies are one of the peculiar features of the system. In some peculiar cases, a resort to a court of equity is to be preferred, because no damages probably attainable would be as valuable as the equitable relief which is certain, if sought. But, as a general rule, the courts of law are adequate to all the emergencies of the case, and they

enforce most of the remedies which parties seek through the interposition of the courts.

§ 3. **Compensation in damages, or not at all.** As has just been seen, the law gives damages for past injuries. But, beyond this relief, a common-law court does not go, for it will not interfere to prevent the violation of a right. It will give damages for the breach of a contract, but a court of equity will do more, it will anticipate the event, and restrain a person who merely shows an intention to break his agreement. It is in those cases in which the damages for past acts would be so small as not to afford an adequate remedy, that the powers of a court of equity are invaluable. In one of these classes of cases the relief obtained is remedial, in the other it is preventive, or, in other words, in one case it is legal, in the other equitable. Where these courts are separate, it is a general rule that neither court will usurp the functions of the other. And, therefore, if the injury complained of be completed, so that compensation alone can be awarded, a court of equity will not interfere, even though it might, in its discretion, have power to do so.

So, on the other hand, a court of law will not entertain an application where no breach of contract has occurred, or no wrongful act has been done, even though it has power to issue an injunction under some circumstances.

In those States in which legal and equitable remedies are enforced by the same court, some of these distinctions may seem to be of no importance, and yet it is to be remembered that the mode of proceeding which is to be adopted must be legal or equitable as the case may require, as will be fully explained elsewhere.

§ 4. **Affords no relief outside of the general rules.** At common law, simplicity and certainty in the practice is a prominent object, and while the rules are so general as to be readily applied to the facts of each particular case, yet they cannot be so extended or varied as to meet the requirements of a system so complicated as some of the remedies afforded by a court of equity. And it is, therefore, a general rule, that the common-law courts do not afford any relief outside of its general system of legal remedies. If other relief is sought, a different court must furnish it, or the party may be remediless.

At common law, the judgments are uniform, simple and invariable, according to the nature of the action. In equity, the relief is modified to suit all the exigencies of the case fully and cir-

cumstantially ; authoritative and binding declarations are made concerning the rights alleged ; specific things are directed to be mutually done or permitted ; and the conduct to be observed by the numerous parties is pointed out, although such parties may sustain relations of widely different characters, or be influenced by interests of a conflicting or important nature.

§ 5. **Do not compel specific performance of contracts.** This subject has already been alluded to, but it is important that the student should understand the nature and the extent of the powers of courts of law, and of equity, if he would act intelligently in the pursuit of remedies.

There is no class of cases, perhaps, in which the want of power in a common-law court is more seriously felt, than in this one relating to the performance of contracts. In many cases, such a performance in good faith, is of the utmost importance to the party who asks that it be carried out. His plans and other contracts may have been based upon its due execution, and his liabilities to others, as well as other consequent losses, may be such that no damages which would be given would make good. There are some instances, in which the contract relates to the personal conduct of a party, which no court will undertake to require to be literally performed, as a contract to sing at a theater, or write a book, or keep an inn, or build a house, for the reason that no degree of compulsion which the court could exercise would secure the desired result. But if the contract contains a negative clause, such as an agreement not to sing at any other theater, or not to write books for others, or the like, there a court of equity will interfere by restraining the party from violating the negative clause. See "Injunction." But in all such cases a court of law would be powerless except to give damages for the breach of the contract. The student will recollect that these remarks treat the matter as though there were separate courts of law and equity, instead of a single court which exercises the powers of both those courts.

§ 6. **Do not prevent the commission of wrongs.** For injuries to real estate, the common-law actions of trespass, waste, nuisance, and the like, are the remedies usually sought. But, where the injury, if once done, would be irreparable, courts of equity sometimes interfere to prevent the commission of the wrongful act, and this relief a court of common law cannot grant. Any exception to this rule will be found to have a statutory origin.

§ 7. Not adapted to complicated equitable cases. It is the tendency of any system of mere legal principles, when reduced to a practical application, to fail of effecting such justice between party and party as the special circumstances of a case may require, by reason of the minuteness and inflexibility of its rules and the inability of the judges to adapt its remedies to the necessities of the controversy under consideration. And it is accordingly found, that the rules of the common law, when reduced to practice, sometimes become the means of injustice in cases in which special equitable circumstances exist, which the court cannot take cognizance of because of the precise nature of common-law principles, their inflexible character, and the technical rules of pleadings and practice which were designed for no remedies except such as the common law afforded. To remedy these inconveniences, and to prevent injustice, the flexible, convenient and just system of equitable remedies was devised, until there are at the present time, but few, if any, cases, in which the courts will not furnish all proper relief, in some form, if applied for in due time and in a proper manner.

§ 8. Powers of the court terminate with the judgment, and its enforcement. At common law, a final judgment, when once entered, exhausts the powers of the court, except in the way of proceedings to review or reverse it. There is no power to open the judgment for the mere purpose of rendering a different judgment upon the same facts, or for the incorporation of facts not noticed upon the rendition of the judgment. If the judgment was regular and legal upon the facts established, the judgment is final and conclusive. If it was irregular, the remedy is by way of proceedings to set it aside; if illegal, to obtain its reversal. An action will not lie at common law for the purpose of obtaining some relief or remedy to which the party was entitled, but which he neglected to present before the rendition of the previous judgment.

Courts of equity exercise much greater powers for the purpose of modifying their decrees, or for their impeachment when they are not such as justice and equity would sustain.

§ 9. Extension of remedies by common law. The extension of remedies by the common law is not by devising new rules or principles, but by the application of existing rules to new combinations of facts, or to new cases which ought to be included in the settled rule. And, in the multiplicity of reported cases, it is a surprising fact that so many of them turned upon the question

whether the conceded rule had been properly applied in the particular case, instead of the point whether there was such a rule as that claimed to be law. Courts of law do not usually claim or exercise the power of devising or creating new principles of law, but limit themselves to the administration or application of such principles as are recognized as the law of the land. And yet, such is the extent, variety and complication of human affairs that require to be settled by the courts, that it will be found that the simplest rule has been applied in a great number of cases which differ widely in the facts of each case; and it may seem in some instances as though a new rule had been adopted and enforced in some of them. Courts of common law, in a great variety of cases, adopt the most enlarged and liberal principles of decision; and, indeed, often proceed, as far as the nature of the rights and remedies, which they are called upon to administer, will permit, upon the same doctrines as courts of equity. *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R., 9 Exch. 222, 223; S. C., 10 Eng. Rep. 395, 396. This is especially true, in regard to cases involving the application of the law of nations, and of commercial and maritime law and usages, and even of foreign municipal law. 1 Story's Eq. Jur., § 34. In matters of mere practice the common-law courts possess and exercise greater powers in the adoption of ordinary rules of practice than in any other respect; and practice, it must be remembered, is but the application of those remedies which the law provides by its general rules.

§ 10. **Exceptions to general legal rules.** When a rule of law has become well settled, the courts cannot properly disregard it. And in the application of this principle, it occasionally happens that a general rule, if strictly enforced, would be productive of hardship or injustice in some classes of cases. But it is to be remembered that an inconvenient or unjust rule of law may be remedied by the legislature; and, until that is done, it is best, as a general rule, to abide by the adjudged cases; for an attempt to change the rule by a judicial decision tends to unsettle the law; and it has been said that "Hard cases make bad law." Broom's Leg. Max. 150, and cases there cited. Hard cases are not permitted to make bad equity any more than bad law. *Moore v. Pierson*, 6 Iowa, 279. And the general practice is, to apply and enforce well-settled rules, even when they cause a hardship in some particular case. *Vermilya v. Austin*, 2 E. D. Smith, 208; *Beaulieu v. Finglam*, cited in argument in *Reedie v. London and*

North Western R. R. Co., 4 Exch. 251 ; *Freeman v. Tranch*, 14 Eng. Law and Eq. 224, 227 ; 12 C. B. 406 ; *Supervisors of Onondaga v. Briggs*, 2 Denio, 32.

There are instances, however, in which a subsequent case may resemble a former one in many of its principal facts, and yet it may also contain some important facts or elements which will bear upon the decision, and, when this is the case, courts frequently act upon the principle of distinguishing the latter case from the former ; and by that means are enabled to render such a decision as the justice of the case may require. *Quinn v. Lloyd*, 41 N. Y. (2 Hand) 353. But, while it is proper to act upon a substantial distinction, the courts cannot properly carry the rule so far as to act upon unsubstantial and shadowy distinctions which do not affect the merits of the case. Such distinctions have properly been termed by the courts nice, subtle, refined, thin, slight or slender, and they have frequently refused to act upon them, and yet, if the courts adopt or make a distinction, the decision is to be followed like any other established rule. It is not desirable to multiply distinctions, as they cannot fail to introduce uncertainty into the law, and in their subsequent applications to other cases may cause as much hardship as would have resulted from enforcement of the general rule. There are those who delight to "split the weight of things on the hair-breadth of words." See *Jackson v. Waldron*, 13 Wend. 207 ; per Tracy, senator.

Distinctions in the decision of causes are not always founded upon the principle that the court does not approve of the rule laid down in the previous case ; for such decision may be fully concurred in, and yet the facts of the subsequent case may be so different in some particulars as to require the decision to be founded upon or modified by them.

§ 11. **Tries questions of fact by a jury.** In common-law actions the right of having questions of fact tried and settled by the verdict of a jury is as much fixed, as are the rights of the parties clear under the rules of the law.

To explain the origin of this mode of trial, or to trace its history, or explain its advantages, is not the present object ; but rather to point out the distinction between this method of trial and that adopted in courts of equity which, as a general rule, dispense with the aid of juries, and try questions of fact before the court itself, upon such evidence as may be proper. And when the nature of the two systems of remedies is considered,

the propriety of the practice in each case will be evident. In simple direct issues, the verdict of a jury would be convenient, safe, and satisfactory. But, in a case involving numerous issues, of an intricate nature, requiring many different special directions, such a trial would be a poor substitute for the careful, elaborate and equitable relief which may be awarded by a profound and conscientious judge who takes time to survey the whole case even to its minutest details, and then pronounces a decree which guards all the rights of both parties. A trial by a referee is not overlooked, but as it is a mere substitute for a trial by jury, it does not require notice in this place.

§ 12. **Legal remedies may exist, and yet be insufficient.** There are many cases in which the common-law courts furnish a partial though defective remedy, while courts of equity afford the fullest relief. To explain fully the particulars in which such relief may or may not be had at law, or to enumerate all the instances in which partial relief is attainable, is not to be expected in this place. A general synopsis of some of the cases will be convenient as an illustration of the defects mentioned.

At common law a corporation might have a good cause of action against one of its members, and yet, at law, no action could be brought upon it, while equity would give full relief. The same rule applies to the case of executors or partners. *Cole v. Reynolds*, 18 N. Y. (4 Smith) 74; *Gridley v. Gridley*, 24 id. (10 Smith) 135, 136. See *Denman v. Prince*, 40 Barb. 213, 217, 218, 219; *Kingsland v. Braisted*, 2 Lans. 17, 20; *Waller v. Thomas*, 42 How. 337; 4 Daly, 551. So in replevin, if the property claimed could not be described with the requisite certainty, a court of equity alone could give the desired aid. An action of account is a common-law remedy, but if the taking of an account is important, the powers of a court of equity are far more desirable than the common-law action. See Account.

A set-off could not be made available at common law, but for a long time past this defect has been remedied by the statute. Before these statutes, a court of equity alone was the proper forum to resort to in such cases. See Set-off.

An action for the recovery of dower is given by the common law, but there were superior advantages for the widow if she applied to a court of equity, in her comparatively helpless condition, and for the advantage of being better able to ascertain in what estates she had a right of dower. The same principles were applicable to cases in partition, or in setting out bounda-

ries. These, and other similar cases which might be mentioned, seem to show that many remedies are common to both courts of law and of equity, and that each court has some advantages over the other in the administration of the law; and if this outline shall serve to render the subject more clear to the student, the object in view will have been attained.

TITLE IV.

OF EQUITABLE SUITS.

ARTICLE I.

GENERAL PRINCIPLES.

Section 1. Courts of equity act on the person independently of damages as a remedy. There is no feature of relief or remedy, afforded by the courts, of a higher value than that of acting directly upon the person of the party who would deliberately violate his contracts, or invade the possessions of another. The relief given by a court of equity may be described as of a positive character, giving the specific thing which the parties are entitled to, while actions at law, with few exceptions, give only the negative remedy of compensation by damages for a deprivation or violation of the true right. 3 Broom & Had. 65, 66; id. vol. 2, 67, 68, Wait's ed., top page.

Wherever possible, equity takes care that a right shall be actually enjoyed, and, with this view, will interfere to prevent a violation of that right. A court of law will not interfere till the violation be effected. It, for instance, will, when a breach of covenant in a lease or in a contract between land owners has been committed, give damages for the breach; but a court of equity will do more, it will anticipate the event, and restrain a person who merely shows an intention to break his covenants. Or, to take another example illustrating the beneficial result obtained by such ready interference, damages will be given in the one court if a man has been carrying on a trade in some particular locality in violation of his contract with another man not to do so. But these damages, which will be only given for past acts of trading, are, it may be, of small value as a remedy compared with the effectual relief which the other court gives by prohibiting the trade on pain of imprisonment. *Ib.* The two

kinds of justice which may be obtained, the one strictly remedial, the other preventive, in respect of the violation of continuing rights, are clearly different in kind; one is legal, the other equitable; and neither of the two courts will usurp the functions of the other. *Ib.*

A clear illustration of the advantages of an equitable remedy over that afforded by a common-law court may be seen in the case of compelling a party to convey lands which are situated in another State. *Gardner v. Ogden*, 22 N. Y. (8 Smith) 327; *Fenner v. Sanborn*, 37 Barb. 610; *Bailey v. Ryder*, 10 N. Y. (6 Seld.) 363; *Newton v. Bronson*, 13 id. (3 Kern.) 587. And yet a common-law action will not lie here for a trespass upon real estate lying in that State. *Watts v. Kinney*, 6 Hill, 82; *Hurd v. Miller*, 2 Hilt. 540; *Mott v. Coddington*, 1 Abb. (N. S.) 290, 1 Rob. 267; *Wait's Code*, 24, 25, 26.

In such case the court has no jurisdiction, unless the person to whom its orders or decrees are addressed is within the reach of the court or amenable to its jurisdiction. The person must be not only within the reach of the court as to locality, but he must have such a character as shall render him personally amenable to the jurisdiction.

The fact that the orders and decrees of the court operate immediately upon persons has had the effect of giving the court a very extensive jurisdiction. As a consequence of this rule, the court may exercise jurisdiction quite independently of the locality of the act to be done, provided the person against whom relief is sought is within the reach and amenable to the process of the court. In exercising the jurisdiction, the court does not lay any claim to the exercise of judicial or administrative rights in a foreign country, but proceeds solely on the circumstance that the person to whom the order or decree is addressed is within reach of the court.

§ 2. **Equity compels the performance of acts specifically.** Another branch of the same kind of positive relief is the power which the court exercises of compelling the specific performance of agreements. A man may be indirectly compelled to carry out his contract by the fear of being mulcted in damages by a court of law, in the event of his failing to do so; but another and often a desirable mode, is to insist upon his performing the duty which he owes under the contract by putting him in prison till he does so. 3 *Broom & Had.* 67; *id.* 69, vol. 2, *Wait's ed.*, top page. See the next preceding section.

Rights which are recognized and protected, and wrongs which are redressed by common-law courts, are called legal rights and legal injuries; rights which are recognized and protected, and wrongs which are redressed by courts of equity, are called equitable rights and equitable injuries. The former are said to be rights and wrongs at common law, and the remedies, therefore, are remedies at common law; the latter are said to be rights and wrongs in equity, and the remedies, therefore, are remedies in equity.

The distinction between courts of common law and courts of equity will be better understood by considering the different natures of the rights they are designed to recognize and protect, the different natures of the remedies which they apply and the different natures of the forms and modes of proceeding which they adopt to accomplish their respective ends.

In all strictly common-law courts, there are certain prescribed forms of action to which the party must resort to furnish him a remedy; and, if there be no prescribed form to reach such a case he is remediless; for these courts do not entertain jurisdiction except in certain actions, and they give relief according to the particular exigency of such actions, and not otherwise. In those actions none but a general and unqualified judgment can be given, which is either for the plaintiff or for the defendant, without any adaptation of it to particular circumstances.

There are, however, many cases in which a simple judgment for either party, without qualifications, or conditions, or peculiar arrangements, will not do entire justice to either party. Some modifications of the rights of both parties may be required; some restraints on the one side or on the other, or, perhaps, on both sides; some adjustments involving reciprocal obligations, or duties; some compensatory or preliminary, or concurrent proceedings to fix, control or equalize rights; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights, or the redress of injuries.

In all these cases, courts of common law cannot give the desired relief. They have no forms of remedy adapted to the objects. They can entertain suits only in a prescribed form, and they can give a general judgment only in the prescribed form. Hence by their very character and organization they are incapable of furnishing the remedy which the mutual rights and relative situations of the parties, under the circumstances, positively require.

But courts of equity are not so restrained; although they have prescribed forms of proceeding, the latter are flexible, and may be suited to the different postures of cases. They may adjust their decrees so as to meet most, if not all, of these exigencies; and they may vary, qualify, restrain, and model the remedy, so as to suit it to mutual and adverse claims, controlling equities and the real and substantial rights of all the parties. Nay, more; they can bring before them all parties interested in the subject-matter, and adjust the rights of all, however numerous, whereas, courts of common law are compelled to limit their inquiry to the very parties in the litigation before them, although other persons may have the deepest interest in the event of the suit. So that one of the most striking and distinctive features of courts of equity is, that they can adapt their decrees to all the varieties of circumstances which may arise, and adjust them to all the peculiar rights of all the parties in interest; whereas, courts of common law are bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff, or for the defendant.

§ 3. **Equity restrains the commission of wrongful acts.** Courts of equity possess a power of restraining the person in relation to particular acts, which is not only a useful but most efficient remedy. The principle upon which the court acts is, that whenever damage is caused or threatened to property, admitted or legally adjudged to belong to the plaintiff, by an act of the defendant, admitted or legally adjudged to be a civil wrong, and such damage is not adequately remediable at law, the inadequacy of the remedy at law is a sufficient equity, and will warrant an injunction against the commission or continuance of the wrong. And though damages cannot be given in equity for the plaintiff's loss, yet, in some cases, if the defendant has made a profit, he will be decreed to account. Adams' Eq. 207. See *ante*, 20, art. 1.

The equity is not confined in principle to any particular acts; those in respect of which it is most commonly enforced are five in number, viz.: waste, destruction, trespass, nuisance, infringement of patent right, and infringement of copyright.

There are three incidents connected with this equity which ought to be mentioned. The equity attaches only on an admitted or legally adjudged right in the plaintiff, admitted or legally adjudged to be infringed by the defendant; it prohibits the con-

tinuance as well as the commission of a wrong; and it extends to an account of the defendant's profit. Adams' Eq. 217.

The relief afforded in equity is either remedial or preventive. The court either grants positive and affirmative relief, or restrains the doing of acts which are against equity and conscience. In giving remedial relief, the court usually proceeds by decree, while preventive relief is administered by injunction.

§ 4. **Equity generally acts without the aid of a jury.** The right to trial by jury in common-law actions, as a matter of course and of right, does not exist in courts of equity. It is one of the fundamental rules of equity practice, that questions of fact are to be decided by the court without the intervention of a jury. And from the nature of the issues to be tried, and the peculiar equities to be administered, this mode of trial is an advantageous one. In disposing of causes, a court of equity does not always render a final decision at once, as upon the trial of a cause by a jury; for, there may be numerous issues or facts to be investigated, before a final decree can be properly made. If a preliminary decree is proper, it is usually in such cases as the following: 1. That in the course of the suit a dispute has arisen on a matter of law, which the court is unwilling to decide; 2. That a similar dispute has arisen on a matter of fact; 3. That the equity claimed is founded on an alleged legal right, the decision of which the court of chancery declines to assume; and, 4. That there are matters to be investigated which, although within the province of the court, are such as the presiding judge cannot at the hearing effectually deal with. Adams' Eq. 375. To obviate these impediments the preliminary decree directs: 1. A case for a court of law; 2. An issue for a jury; 3. An action at law, to be determined in the ordinary course; or, 4. A reference to one of the masters of the court, to acquire and impart to it the necessary information. *Ib.* Each of these methods of inquiry may be also adopted on interlocutory applications by motion or petition. *Ib.*

§ 5. **Relief is granted or refused by courts of equity, as justice requires.** The principles upon which the jurisdiction of courts of equity proceed are these, conscience, good faith, honesty and equity. And, in the exercise of its powers, one general maxim in early times was, that chancery would take cognizance of such cases only as were not remediable by the common law. But this jurisdiction was not merely suppletory, it was also corrective. In some cases it gave relief where none could be had at law; and,

in other cases it interfered to relieve against proceedings taken in courts of common law.

In equity, the term *conscience* originally embraced those obligations which result when one person is placed in any situation as regards another, that gives the one a right to expect, on the part of the other, the exercise of good faith toward him. The determination of cases according to *equity*, embraced all those instances in which a party, who has not committed any act contrary to good faith or conscience, but who may yet, according to the strict rules of positive law (which may, in their general application, be founded on natural justice), or by the silence of the law in not providing at all for some particular case, have an advantage which it is contrary to the principles of equity that he should enforce or retain. In such cases, a resort was had to the general principles of equity, in the sense of natural justice, which are antecedent to all positive law. In proceedings thus founded upon right, justice and conscience, the court took cognizance of cases in which there was no remedy at law; and it might also decline to interfere when the claim made was such that a court of equity could not, according to its principles, enforce it; and, as a result of this system, the court could in many cases grant or refuse the relief sought, according as justice might dictate.

But a court of equity will not in any case allow itself to be made an instrument of injustice. And where a court of equity by its interposition to prevent an act rightfully or wrongfully intended, has caused the loss of a remedy at law, this court will give him a remedy equivalent to that from which the interposition of the court debarred him. *Pulteney v. Warren*, 6 Ves. 73; *Brown v. Newall*, 2 M. & C. 558, 572.

§ 6. Grants relief where the law does not. Courts of equity proceed upon the principle that they will grant relief in those cases in which it ought to be granted according to equity, but where no remedy is given by the common law. This omission may arise in those cases in which the rules of the common law have made no provision for a case like the one presented for adjudication; or it may be that the rules of practice of the courts of law do not meet the requirements of the particular case, and thus fail to give any remedy, or a very inadequate one.

The remedial process, the pleadings and practice of courts of equity, are all so framed that the party may obtain every relief consistent with equitable principles. And the final remedial pro-

cess may be so varied as to meet the requirements of these equities, in those cases in which the jurisdiction of the court exists, by commanding what is right, and forbidding what is wrong, and then enforcing the decree made. A court of equity has jurisdiction in cases of rights, recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law. The remedy must be plain ; for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate ; for if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete ; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time, and in future ; otherwise equity will interfere and give such relief and aid as the exigency of the particular case may require. The jurisdiction of a court of equity is, therefore, sometimes concurrent with the jurisdiction of a court of law ; it is sometimes exclusive of it ; and it is sometimes auxiliary to it.

§ 7. **Equity is governed by settled rules and principles.** Courts of equity had their origin in the wants of suitors who failed to obtain a remedy through the aid of common-law courts. And, in many instances, equity gave proper relief when the law courts had no means of affording the desired and needed remedy. In the contests between the courts of law and those of equity, at an early period, it was sometimes said that the latter courts were not governed by settled rules, but acted upon an arbitrary discretionary power. But, waiving that question, it is sufficient to state, that for a long period the powers of these courts, and the rules and principles upon which they proceed, are as well settled as those of the common-law courts.

The object of a court of equity was to afford relief in those cases in which no legal relief was attainable. But it has also been said that it was the business of a court of equity to abate the rigor of the common law ; and, while it may be conceded that, in some cases, the interference of a court of equity has had this effect, yet all the rules of the common law which equity has taken upon itself to overrule have long since been well defined, and many of them have ceased, even at common law, to govern the judgments of the courts. 3 Broom & Had. 54 ; *id.* vol. 2, p. 58, Wait's ed. The educational course, which courts of equity seem to have furnished to courts of law, has been long so far

completed, that no new doctrines in equity opposed to the rules or doctrines of courts of law have been established. *Ib.* 55. Nor does equity, even now, profess to criticise or review decisions of courts of law; moreover, it does not, and never did, interfere to mitigate the severity, where any exists, of rules of positive law. There are, however, some of the early cases in which equity has very nearly, if it has not absolutely, overridden positive law; and those cases relating to the statute of frauds serve as well as any to show how far the power has been exercised. *Ib.* 56.

There are certain principles, on which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases as they arise by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles; but the principles are as fixed and certain as the principles on which the courts of common law proceed. *Bond v. Hopkins*, 1 Sch. & Lefr. 428, 429.

This application of existing principles to new cases as they arise is not peculiar to courts of equity; for the common-law courts are daily engaged in adding to the principles of the old jurisprudence, and in enlarging, illustrating and applying legal maxims and rules.

§ 8. **Equity devises new remedies.** The numerous cases in which equity interfered and granted relief where none was given before has given rise to the opinion that courts of equity devise new remedies. When it is said that equity grants relief, while at law the complaining party was remediless, it might seem like a new remedy; and yet, it will be remembered that such relief was in accordance with well-settled principles of equity. But, even if it were assumed that courts of equity did, at an early day, exercise the power mentioned, it must be remembered that this court is now as much controlled by general laws as any other court. And while it is proper that all courts should freely exercise their powers for the advancement of justice, it is the part of wisdom and of safety for all courts to keep clearly within the limits of their jurisdiction; and, if additional powers are required, to leave that matter with the legislature. It is province of the statesman, not of the lawyer, to discuss, and of the legislature to determine, what is best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only: the written, from the statutes; the unwritten

law from the decisions of his predecessors, and of the existing courts, or from text writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; it is not, however, the duty of a judge to speculate upon what may be most, in his opinion, for the advantage of the community. Broom's Com. Law, 5, 6. *See ante*, 5, art. 1, § 1. *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R., 9 Exch. 222, 223; §§ 10, Eng. Rep. 394, 395.

§ 9. **Mode of relief differs more than principles of law.** The law speaks but one language, for all courts, in reference to the legal rights of the parties involved in a litigation. But, in matters of mere practice, there is a wide difference between courts of equity, and those of law, and, in many instances, it is the sole difference to be considered by the party seeking to have his rights determined by a court.

§ 10. **General rules and maxims of equity.** In actions at law, every party may stand upon his strict legal rights, and the court is bound to give the remedy which the law has provided. In courts of equity, there are some rules and maxims which seem more like the exercise of a discretionary power, as they doubtless are in some instances.

First. If equity once had jurisdiction of the subject-matter because there is no remedy at law, or because that remedy is inadequate, it does not lose the jurisdiction merely because the courts of law afterward give the same or a similar relief.

Second. Equity follows the law. This is true as a general maxim. Equity follows the law, except in relation to those matters which give a title to equitable relief because the rules of law would operate to sanction fraud or injustice in the particular case.

Third. Where there is equal equity the law must prevail. The ground upon which the suitor comes into a court of equity is that he is entitled to relief there. But, if his adversary has an equally equitable case, the complainant has no title to relief, and the court will not interfere on either side.

Fourth. Equality is equity. This rule is applied to cases of contribution, apportionment of moneys due among those liable to, or benefited by the payment, or abatement of claims on account of deficiency of the means of payment, etc.

Fifth. He who seeks equity must do equity. A party cannot claim the interposition of the court for relief unless he will do

what is equitable should be done by him as a condition precedent to that relief.

Sixth. Equity considers as done that which ought to have been done. The illustration of this rule will be found in works upon equity.

Seventh. He who has committed iniquity shall not have equity. As in cases of illegal contract, or where a party has put his property out of his hands to defraud his creditors, a court of equity will not restore the party to his former condition.

Eighth. Equity suffers not a right without a remedy. This maxim is generally, though not universally, true.

Ninth. When the equities are equal in other respects, he who is first in point of time will secure the advantage. But if the equities are unequal, preference will be given to the superior equity.

Tenth. The fund which has received the benefit should make satisfaction. Again, satisfaction should be made to that fund which has sustained the loss.

Eleventh. Equity acts upon the person. This maxim has been explained *ante*, 20, art. 1.

Some of the principal distinctions between legal actions and equitable suits having been thus briefly noticed, our next inquiry will relate to the effect of the union of legal and equitable remedies which are now administered by the same courts in both classes of cases.

TITLE V.

THE UNION OF LEGAL AND OF EQUITABLE REMEDIES.

ARTICLE I.

GENERAL PRINCIPLES.

Section 1. Mode of uniting the two systems. Under the former English system, courts of law and courts of equity were separate and distinct organizations, each of which administered the rules of law, or the principles of equity, according to a long-established practice.

The general adoption of this system in many of the States of the Union is familiar to every student. In this State there were formerly courts of law, and also a court of chancery, both of

which had existed from an early period, and they continued to exist down to the year 1846.

By the constitution of 1846, it was provided by article 6, section 3: "There shall be a supreme court having general jurisdiction in law and equity." In accordance with this provision, the legislature enacted a law, declaring that the Supreme Court, organized under this constitution, should have the same powers and exercise the same jurisdiction as that possessed and exercised by the Supreme Court or the Court of Chancery of this State. Laws 1847, ch. 280, § 16.

By section 69 (62) of the Code, the distinction between actions at law, and suits in equity, and all the forms of such actions or suits were abolished; and but one form of civil action, for the enforcement or protection of private rights, or the redress of private wrongs, was recognized.

The object of these changes was, to obviate many of the inconveniences arising from a double system of practice, and also to simplify the proceedings in all the courts.

The principles of the common law were generally plain, simple, few in number, and unbending in many instances to suit the exigencies of the particular case to be decided. The result was sometimes inconvenient, if not unjust, and for this reason the court of chancery was established for the purpose of softening the rigor of the common law, and for doing complete justice by means of forms of proceeding peculiar to itself. But even this system of a double court, with separate forms of proceeding, did not prevent the existence of some inconveniences; and, for the purpose of securing all the advantages, and avoiding all the inconveniences of the former systems, the present system of blending law and equity practice was adopted in this State.

§ 2. Principles of law and equity unchanged. It will be remembered that the matters under consideration relate to the practice of the courts, and not to the general rules of law, nor to the principles of equity, by which rights are to be decided, or wrongs redressed. The rules of law will remain unchanged, whether they are enforced by a court having nothing but a common-law jurisdiction, or by a court of equity, or by a court exercising both a legal and an equitable jurisdiction.

"Although the Code has abolished all distinctions between the mere forms of action, and every action is now in form a special action on the case, yet actions vary in their nature, and there are intrinsic differences between them which no law can abolish

It is impossible to make an action for a direct aggression upon the plaintiff's rights by taking and disposing of his property, the same thing, in substance or in principle, as an action to recover for the consequential injury resulting from an improper interference with the property of another, in which he has a contingent or prospective interest. The mere formal differences between such actions are abolished. The substantial differences remain as before. The same proof, therefore, is required in each of these same kind of actions as before the Code, and the same rule of damages applies. Hence, in an action in which the plaintiff establishes a right to recover, upon the ground that the defendant has wrongfully converted property, to the possession of which the plaintiff was entitled at the time of the conversion, the proper measure of damages still is the value of the property ; while in an action in which the plaintiff recovers, if at all, upon the ground that the defendant has so conducted himself in the exercise of a legal right in respect to another's property, as unnecessarily and improperly to reduce the value of a lien, which the plaintiff could only enforce at some subsequent day, the damages must, of course, depend upon the extent to which that lien has been impaired." *Goulet v. Asseler*, 22 N. Y. (8 Smith) 228, 229, SELDEN, J.

The union of the two systems of law and equity practice has not enlarged the powers of the new court, either as to legal or equitable jurisdiction ; in relation to the rights which they may declare ; or the remedies which they may enforce. And where an injunction could not have been granted under the former practice by the old court of chancery, it cannot now be granted by the new court, because the equitable jurisdiction of the courts is not enlarged by the union of legal and equitable powers in one court, nor by the provisions of the Code. *New York Life Ins. Co. v. Supervisors of New York*, 4 Duer, 192 ; 1 Abb. 250.

An action of trover could not have been maintained under the former practice without proof of an unlawful detention or a conversion of the property ; and under the Code this proof is equally essential. *Eldridge v. Adams*, 54 Barb. 417 ; *Hale v. Omaha National Bank*, 7 J. & Sp. 207 ; see *Goulet v. Asseler*, 22 N. Y. (8 Smith) 225. Although the Code abolished the forms of actions, yet the principles by which the former actions were governed still remain, and control as much now as formerly in determining the rights of parties. *Ib.* See *ante*.

The abrogation of the distinction between actions at law and

suits in equity, by enacting that there should be but one form of action, which should be called "a civil action," did not obliterate the distinction between the two sorts of proceedings, so far as the federal courts are concerned. *Thompson v. Railroad Companies*, 6 Wall. 134. And, if a civil action is brought in a State court, and it is essentially a common-law action, then the common-law form, and not an equitable one, must be pursued if the case is removed into a federal court. *Ib.* An action in a common-law form cannot be prosecuted in a State court up to the removal of the cause to a federal court, and then have the form of the action changed into that of a suit in equity. *Ib.* If the original form of the action was in accordance with the practice of the State courts, no change will be necessary on the removal of the cause, as the federal courts will, in such cases, adopt and apply the practice of the State courts. *Ib.* But this adoption of the State practice is not to be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. *Ib.*

§ 3. Joinder of actions, whether legal or equitable. Under the former system, a party sometimes erred in the choice of a court in which to obtain a remedy; and the result was delay and expense, if no other loss ensued. A party who instituted a suit in equity, when his remedy was at law, was turned out of that court to begin again; and the same was true, when an action was brought at law in a case where equity afforded the only relief. As the courts of this State are now organized, where the same judge presides in all cases presented for adjudication, no one can be turned out of the supreme court upon the ground that his action was commenced in the wrong court. But, before noticing what causes of action may be joined, it ought to be mentioned that the rules of law and the principles of equity have not been changed or blended, even when legal and equitable remedies are both sought in a single action. Formerly, an action at law and a suit in equity were both essential, in some cases, if full justice was done to both parties. But by the present system, it is intended that one action shall attain the same result, with less delay, expense or difficulty than under the old practice. The former courts of law and the old court of chancery each had a separate jurisdiction, and each had a system of practice which differed materially from that of the other. The present system adopts the same practice for all classes of actions, or of remedies, so far as that result is practicable. And, in reference to the mode of

commencing actions ; the general mode of pleading ; the practice on the trial ; the mode of entering judgments and of enforcing them ; and even the remedy by appeal ; there is much that is alike, and where there is a difference, it is in those matters which are required by the nature of the action. But while many of the proceedings and forms will be the same, whether the remedy sought be legal or equitable, there will be some proceedings and forms required in some classes of actions, which would not be appropriate in, nor would they be adapted to, the other. The same judge may hear an action at law or a suit in equity, and either action may be commenced by a summons ; but, even in such a case, there will be some difference in the form of the summons. Again, an action upon a promissory note may require many proceedings, which are essentially like those in a suit in equity, for the adjustment of complicated equities ; but yet there are, and there always must be, differences in the mode of conducting these actions. And it will be found, on a careful examination, that, except in the uniformity of general proceedings already mentioned, the courts adopt the equity practice in equitable suits and proceedings, and those of the common-law practice in actions at law. In most actions of a legal nature the issues are few and simple, and readily disposed of by a jury ; but, in an intricate equity suit, there are many matters which no jury could possibly dispose of in a proper manner. In such cases, the practice in each action must be such as is appropriate under the circumstances ; and, while pursuing such a mode, it does not interfere with the aforesaid principle, that the practice in actions at law and in suits in equity have, so far as practicable, been united. The object in blending them was to secure as great uniformity as was attainable, but it was not considered any less important to retain all the advantages of both systems, and to use them whenever the ends of justice and the objects of the law would be best subserved. Uniformity in the practice is not to be limited to an attempt to reduce every kind of action to one form of proceeding, nor will it be secured by applying the same rules of proceeding in every case. In equitable actions there are, in nearly all cases, many steps to be taken which would not be proper in an action at law, and yet they are indispensable in equity proceedings. This difference does not in any manner interfere with the general rules of practice, which are equally applicable to either class of actions. Consistency in relation to joining actions at law and suits in equity does not require that the practice should be uniform in

all particulars, for that is plainly impracticable. When as great uniformity as is practicable is attained, all the advantages of blending the two systems will have been secured. And the next important step will be to adopt a uniform and harmonious practice in relation to each class of actions, whether legal or equitable. And it is just here that some of the most perplexing questions have arisen. The present practice is much of it founded upon statutes, and the difference of opinion among judges in construing them has been greatly increased by the large number of judges who have decided the various questions as they arose in the course of actions. Material differences in the minds of the judges, and of their various modes of study and practice, in addition to the fact that many cases were decided without the aid of previous decisions, which were not then reported, have all tended to increase the number of contradictory adjudications. These inconveniences had, however, some corresponding advantages; for, if each judge had decided all his cases without the aid of previous decisions, there would remain the advantage of his own unbiased judgment, acting independently of authority, and thus securing the reasoning of a strong mind after a thorough examination of the case. Conflicting decisions upon the same question are a serious inconvenience in the practice, and they have been somewhat the cause of incongruities in the practice. But much of this evil may now be avoided, for it may be safely said, that most of the difficult questions in the practice are now settled by a clear current of authority.

In some instances the true rule is so well settled that no one would question what the rule is. In other cases, there may be a conflict in the authorities, but even these cases are less numerous than one might imagine on a first thought; and, after a careful examination of all the authorities and the statutes, the true rule may be discovered, and a harmonious system laid down for the convenience of the student, the profession and the courts.

TITLE VI.

OF THE RIGHT OF ACTION.

ARTICLE I.

IS A REMEDY GIVEN BY LAW.

Section 1. In general. The present work was intended to furnish information as to the rights of action, and as to the grounds of defense; but not to treat fully the mode of prosecuting or defending actions, or other proceedings in the courts of record. The rights of person and of property are numerous and frequently in conflict, and the injuries done to them are frequent and serious. To learn with certainty whether the complaining party has any remedy, either at law or in equity, is sometimes quite difficult. And, for that reason, the first inquiry which naturally arises on the statement of the case is, whether an action or legal proceeding can be maintained. It is generally difficult to lay down any general rule which has no exceptions. And, as an illustration of this, it may be said, as a general rule, that there is no wrong without a remedy, and, again, there is no right without a remedy, for the want of a right and the want of a remedy are reciprocal. Yet, there are injuries for which the law does not furnish any remedy.

In every proceeding in a court of justice the object is, or ought to be, the establishment or recovery of a right, or the prevention of a wrong, or to furnish redress for the wrong if already committed. And no one can properly resort to a court of justice until his right has been disputed, infringed upon, or threatened by a wrongful act, for it is the injury done to him which confers on the party wronged a right to demand that redress which the law gives for the injury sustained.

Before instituting an action, the first question is, whether, upon all the facts that can be established, any remedy can be had, either of a legal or equitable nature. If this inquiry is determined in the negative, the matter is at an end. But if answered in the affirmative, then other considerations will be weighed before proceeding in the matter.

Where a party has a legal right to do a particular act, the motive with which he may assert his right will not give a right

of action even where malice prompted the act. *Mahan v. Brown*, 13 Wend. 261; *Auburn & Cato Plank Road Co. v. Douglass*, 9 N. Y. (5 Seld.) 444; *Chatfield v. Wilson*, 28 Vt. 49; *Occum Co. v. Sprague Manuf. Co.*, 34 Conn. 530; *Stevenson v. Newnham*, 13 C. B. 285. When malice will be considered, see *Lumley v. Gye*, 2 Ell. & Bla. 216; *Cottrell v. Jones*, 11 C. B. 713.

The consent of a party to an act is generally a bar to an action for any injury sustained in consequence. *Illinois Central R. R. Co. v. Allen*, 39 Ill. 205; *State v. Beck*, 1 Hill (S.C.), 363; *Pillow v. Bushnell*, 5 Barb. 156. And see Broom's Legal Maxims, 201. *Volenti non fit injuria*. See "Contributory Negligence."

§ 2. Are there sufficient existing facts. No part of the practice presents greater difficulties, or furnishes sharper conflicts than the establishment of the facts claimed by the respective parties to exist, and to be precisely as each party claims they are. One of the most important questions, then, is to settle whether there are such facts as the complaining party alleges. And, before considering any other point, the first investigation will be as to the actual existence of the alleged facts. If it is doubtful whether the facts ever really existed, this difficulty may be insuperable. Again, let it be supposed that the facts once really existed, but that at the present time they cannot be established by proof; in such a case, it must be recollected that where the court cannot take judicial notice of a fact, it is the same as if the fact had no existence. In the next place, let it be assumed that the facts once existed, and that some proof thereof may be made, the next inquiry will be whether the opposite party is able to adduce satisfactory countervailing proofs, and, in that case, to determine whether, for all practical purposes, the facts are not really the same as though they were non-existent.

One further consideration ought not to be overlooked, and that is in relation to the preservation or perpetuation of evidence which may now be attainable, but which may be lost by the death of a single witness, or the destruction of some important document. In every such case there ought not to be any delay in taking such steps as will preserve the evidence.

An action does not lie against two persons for conspiring together, maliciously and vexatiously, and without reasonable or probable cause, to commence, and for commencing, an action against the plaintiff, in the name of a third person, but for their own benefit, without there is an allegation of legal damages resulting to the plaintiff therefrom. *Cotterell v. Jones*, 11 C. B.

713. Whether or not it will lie *with* such an allegation — *quere*. *Ib.* See 2 R. S. 551, § 1; *Craig v. Twomey*, 14 Gray, 486. An action brought in the name of another person, without his authority, is a groundless and unlawful suit; and for the damage done to the defendant in such suit, he may recover against the person by whom it was brought. *Foster v. Dow*, 29 Maine, 442.

§ 3. **Actions for injuries to person or personal rights.** The numberless injuries which may be done to the person, or to personal rights, have furnished materials for a vast collection of large volumes; and a resort must be had to them and to the reports and statutes for further information. Two inquiries ought always to be made and satisfactorily answered, before instituting an action. First.* Are the facts such that, upon the whole case, independently of any defense, the law will give a right of action? Secondly. Can the defense establish facts which will constitute a complete answer or bar to the action, by showing a legal excuse or justification for the acts done? These questions may not always be easy to dispose of, but their examination is an imperative duty.

§ 4. **Actions relating to property, real or personal.** This subject, like the last preceding one, is so vast that nothing more will be done in this place than to remind the student of the importance of a thorough knowledge of the law relating to such property. There is no mode by which a title to it can be acquired that may not be a subject of investigation. There is no wrong which can be done to it which may not need the aid of the courts. And there is no contract which can be made in relation to it that may not become a subject of inquiry.

If the inquiry involves a question of title, then it will be necessary to examine the particular kind of title, which is claimed to exist. If the right of possession is in dispute, this question may require much labor to solve it. If the action be for a wrong done to such property, the right of the complainant thereto, his right of possession at the time of the injury, and the right of the defendant to do the acts complained of, may all become important. In brief, nothing that relates to the title, the right of possession, or the claim made by the defendant, is to be overlooked.

Fraud in obtaining personal property is a wrong to property, for which an action lies as clearly as for a wrongful taking or conversion of it. *Cleveland v. Barrows*, 59 Barb. 364.

§ 5. **Actions founded upon contracts.** Some of the most important interests in society are based upon contracts, express or implied, and as actions are daily brought for the breach of such contracts, so the whole law on that subject must be a constant subject of investigation. Some few elements of contracts must always be kept in view investigating rights claimed to be founded upon contract. There must be a subject-matter of the contract; a sufficient legal consideration; an assent given by parties legally competent; an agreement, express or implied, to do or omit some specified or understood thing; the contract must be executed in due form of law, and it must not be illegal in its nature or provisions. Some one or more of these matters require attention in every case where a remedy is claimed by virtue of a contract, or where a defense resting on contract is interposed.

§ 6. **Actions founded upon torts.** The infinite variety of injuries which may be done to person, to personal rights, or to property, real or personal, affords a wide field of investigation as to rights and remedies. It would be an endless task to enumerate all the wrongs of which the law takes cognizance, and in respect of which redress, in the shape of compensation in damages, is afforded. Assuming that due attention will be given to those cases in which an action will lie if the proper facts are established, it will next be important to point out some of the cases in which no action can be maintained, even in cases in which it is clear that one party has sustained damages from the acts or omissions of another.

To constitute an actionable tort, the general rule is, that there must be an actual or legal damage to the plaintiff, and a wrongful act by the defendant. But, notwithstanding this, one person may sustain a serious injury at the hands of another, as in the case of an inevitable accident (*Harvey v. Dunlop*, Hill & Denio, 193; *Bennett v. Ford*, 47 Ind. 264; *Brown v. Collins*, 53 N. H. 442; 16 Am. Rep. 372; *Holmes v. Mather*, Law Rep., 10 Exch. 261), or a lawful act done in a lawful manner, without any carelessness or negligence, in which cases there is no legal injury, and no tort which will sustain an action for damages. Again, a party in doing an act in necessary self-defense may injure another without being liable to an action, as where a lighted firework is thrown into a company and again thrown out in self-defense, when it falls against another, or explodes in his face and blinds him. *Scott v. Shepherd*, 3 Wils. 403; 2 W. Bla. 892. So if a person's lands are exposed to the inroads of the sea, he may erect proper sea-walls

for the protection of his lands, without liability for any injury which his neighbor may sustain in consequence. *Rex v. Pagham, Com., etc.*, 8 B. & C. 360. One who owns a house commanding a fine sea view, may sell the house, and afterward build on his own land in such a manner as to shut out the sea view of such purchaser, and yet not be liable to an action. There may be other wrongs which do not cause such legal damages as to sustain an action, as where there is a slander by word of mouth, but the words do not convey an imputation of an indictable offense, if the injured party has not, in consequence, sustained some pecuniary loss, or been injured in his trade, occupation or profession. At common law the most unjust and public charge or imputation of a want of chastity on the part of a female is not actionable without proof of actual damages (*Pettibone v. Simpson*, 66 Barb. 492; *Wilson v. Goit*, 17 N. Y. [3 Smith] 443), though the rule is now otherwise by statute in this State. Laws N. Y., 1871, ch. 219, § 1; 9 Edm. Stat. 67.

There are other cases in which the damage is too remote to give rise to a cause of action. The publication of a libel upon an opera singer, who was deterred from singing because of her fears of injury which might be done by some one influenced by the libel, but not on account of the publication of the libel itself, will not be sufficient to maintain an action by the manager against the author of the libel. *Ashley v. Harrison*, 1 Esp. 49. So, in an action for slander, when the defendant has uttered slanderous words in respect of the plaintiff, not imputing to him any indictable offense, and creating a cause of action only in case the utterance of the slander has caused actual legal damage to the plaintiff, and no such damage has accrued to the plaintiff directly from the utterance of the words, and they would have failed to produce any injurious consequences to the plaintiff, if they had not been repeated by another person, the injury resulting from the intervention of that other person cannot be visited upon the defendant. *Ward v. Weeks*, 7 Bing. 211; *Parkins v. Scott*, 1 H. & C. 153.

Competition in trade is not actionable. In such a case there is no wrong, for the act done is the mere exercise of an undoubted right which belongs to every member of society. So, if a fisherman fits out a boat with lines and nets, and goes to fish in the high seas, and another fisherman comes and fishes beside him, and with tempting baits, or other contrivances, draws away the fish from the lines and nets of the first comer, with a view of

catching them himself, an injury may be done; but there is no tort or wrong, for the one had as much right to fish, and to use fair and reasonable means to catch fish, as the other; but if the rival fisherman lays hold of the nets of the first comer, or violently disturbs the water and drives away the fish, and prevents the latter by force or violence from exercising his occupation or calling, there is then a wrong done to him, and he is entitled to compensation in damages. *Young v. Hichens*, 6 Q. B. 606.

Where the negligence of the plaintiff contributed to bring about the injury complained of, he will, as a general rule, be remediless, and upon this point the cases are very numerous. But in this connection, it should be noticed that contributory negligence on the part of the plaintiff may not prevent his action, unless his acts were such that but for them the injury could not have happened; or, if it appeared that the defendant might have avoided the consequences of the plaintiff's neglect or carelessness, by the exercise of due care on his own part. See the cases cited in 2 Wait's N. Y. Dig. 1087 to 1091.

An action will lie for a continuing tortious act, which injuriously affects the property of another although no appreciable damage results from it. *Delaware & Hudson Canal Co. v. Torrey*, 33 Penn. St. (9 Cas.) 143; see, also, *Thomas v. Brackney*, 17 Barb. 654; *Carhart v. Auburn Gas-light Co.*, 22 id. 297; *Honsee v. Hammond*, 39 id. 89; *O'Riley v. McChesney*, 3 Lans. 278. There is a class of cases, in which it is material to the preservation of a right, that its invasion, although productive of no positive or appreciable damages, should not be tolerated or suffered with impunity. Thus, trespass for the breach of a close is maintainable for an entry on the land of another, though no real damage was occasioned thereby, one main reason being that repeated acts of going over the land might eventually be relied upon as evidence of title to do so, and thereby the *right* of the plaintiff to the absolute enjoyment of the land might be injuriously affected. The proposition may indeed be generally stated that whenever one man does an act which, if repeated, would operate in derogation to the rights of another, he is liable to an action, without particular damage, at the suit of the person whose right may be affected. *Harrop v. Hirst*, L. R., 4 Exch. 47, per KELLY, C. B.

§ 7. Is there an existing right of action. A full and careful examination of a case may show clearly that there was once a good cause of action; but, since there are many ways in which

such right of action may be suspended, impaired, or destroyed, it is always proper to consider how far the case in hand has been thus affected, and whether there is a present perfect right of action.

When all the facts alleged in the complaint are conceded to be true, but they are not sufficient to constitute a cause of action, the occurrence of a material fact after the service of the summons cannot be incorporated in the complaint, and will not be of any avail in maintaining the action, because the right of action must be complete before the action is brought. *McCullough v. Colby*, 4 Bosw. 603; 5 id. 477; *Wattson v. Thibou*, 17 Abb. 184; *Buchanan v. Comstock*, 57 Barb. 582; *Hare v. Van Deusen*, 32 id. 92; *Oothout v. Ballard*, 41 id. 33; *Smith v. Aylesworth*, 40 id. 104; *Bostwick v. Menck*, 4 Daly, 68; *Church v. Frost*, 3 Thomp. & Cook, 318; *Muller v. Earle*, 5 Jones & Sp. 388; *Castrique v. Bernabo*, 6 Q. B. 498; *King v. Accumulative Assurance Co.*, 3 C. B. (N. S.) 151.

As there are many important matters which require due consideration before bringing an action, it may be convenient to refer to some of them.

First. Where there has once been a good cause of action, it is well to inquire whether it has been relinquished or forfeited by any act or omission of the party entitled to it, as by laches, lapse of time or otherwise.

Secondly. If the cause of action arises on contract, has the plaintiff performed all such terms or conditions of it as the law requires of him before the other party can be put in default?

Thirdly. Are there any acts which ought to be done by the complaining party before his right of action is complete; such as making a request or demand upon the opposite party, giving notice of some matter or thing of which he is entitled to notice, or offering to do some act or perform some condition?

Fourthly. Has the performance of the contract become illegal by act or operation of law; or has it become impossible by any acts or events which will legally excuse the performance by the defendant?

Fifthly. Has the defendant done any thing which will relieve him from the liability to an action, such as making a tender before suit brought, or offering judgment, paying the demand, or offering to liquidate damages, so that he will be relieved from the costs of the action even though the plaintiff has a verdict?

Sixthly. Has the right of action, if once perfect, been in any

manner destroyed or barred, as by a release, an accord and satisfaction, an arbitrament and award, or been discharged by operation of law, or the like ?

Seventhly. Has the right of action been suspended, as by taking a negotiable security which is not due ; by a valid extension of the time of performance which has not expired ; or by any valid agreement which prevents an immediate action ?

Eighthly. Has the plaintiff recovered a judgment in a case in which he seeks a remedy founded upon such recovery, or has he been defeated in an action so as to entitle him to recover the consequent loss from the defendant ; or has a right of action been established at law in those cases, in which such a recovery is necessary before an equitable remedy is given, as by injunction, etc. ?

Ninthly. Where the cause of action arose upon contract, how far will an action be affected by a discharge or other proceeding under a bankrupt or insolvent law ?

Tenthly. Is either party under any legal disability, such as infancy, coverture, lunacy, alienage or the like ; and if so, what steps are necessary to be taken so that the remedy shall be legally pursued ?

Eleventhly. Is the claim or demand barred by the statute of limitations ; and if it has been, is the demand renewed by a written promise, by a valid part payment or the like ?

From these general suggestions it will be seen that the plaintiff must examine the law carefully as to his original right of action, and, in addition, must, as far as possible, anticipate every ground of defense which is likely to be interposed.

§ 8. Cumulative or exclusive remedies by action. A statute which provides that a penalty imposed by it may be recovered by a summary proceeding upon complaint before two or more justices, does not bar the party from his remedy by action. *Collinson v. Newcastle & Darlington Railway Co.*, 1 Car. & Kir. 546 ; *Lichfield v. Simpson*, 8 Q. B. 65. See *Lane v. Salter*, 51 N. Y. (6 Sick.) 1. But where a pecuniary obligation is created by a statute, and a remedy expressly given for enforcing it, that remedy must be adopted. *St. Pancras (Vestry) v. Battenbury*, 2 C. B. (N. S.) 477 ; *Dudley v. Mayhew*, 3 N. Y. (3 Comst.) 9 ; *First National Bank of Whitehall v. Lamb*, 57 Barb. 434. Where a statute authorizes a corporation to forfeit the shares of stock of a subscriber for the non-payment of installments due upon a stock subscription, an exercise of the right of

forfeiture on the part of the corporation will bar any subsequent action for such installments. *Small v. Herkimer Manufacturing Co.*, 2 N.Y. (2 Comst.) 330; *Mills v. Stewart*, 41 N. Y. (2 Hand) 384.

§ 9. **Illegality of ground of action.** No principle of law is better settled than that which declares that an action cannot be maintained upon any ground or cause which the law declares to be illegal. *Davidson v. Lanier*, 4 Wall. 447; *Rolfe v. Delmar*, 7 Rob. 80; *Stewartson v. Lothrop*, 12 Gray, 52; *Howard v. Harris*, 8 Allen, 297; *Pearce v. Brooks*, L. R., 1 Exch. 213; *Smith v. White*, L. R., 1 Eq. Cas. 626. See title "Illegality."

§ 10. **Of leave to bring or defend actions.** As a general rule, actions may be commenced or defended without any leave of the court for that purpose. There are, however, some classes of action in which the court ought to be applied to for leave to bring or defend the action. The necessity for such an application always arises from some special character of the parties, either as plaintiff or defendant, and, therefore, it is always proper before commencing an action, or interposing a defense, to ascertain whether or not it is one of those cases which requires an application for leave to sue or to defend. The necessity for such an application will usually depend upon the fact whether or not any of the parties to the action are under the control or the protection of the court. If they are not, then leave to sue or defend is unnecessary; if they are, then it is necessary. An omission to obtain leave to sue where such leave is necessary, is a mere irregularity in practice, and it is not in any case an element of the cause of action. *Chautauque Bank v. Risley*, 19 N. Y. (5 Smith) 369 (376); *Lane v. Salter*, 4 Rob. 239. See 1 Wait's Prac. 191-215; see, also, *post*, "Leave to Sue," etc.

§ 11. **Of the parties to an action.** It is of the utmost importance that the proper persons should be made parties plaintiff or defendant as the case may require. And under the common-law system of practice, an omission in this particular was frequently followed by the most serious consequences. But, under the liberal system of the Code, the courts have power to correct such errors, and to relieve parties from the consequences of an error in this respect, when they have acted in good faith, and where the furtherance of justice will be promoted by an amendment. See 1 Wait's Pract. 88-180, as to the proper parties to an action.

In the present work, there will, in many cases, be full information given as to who are proper parties plaintiff or defendant. In most of the titles will be discussed the right of action, as well

as the questions who may sue or who may be sued. The parties who may defend, and what to interpose as a defense, will be found in that part of this work entitled "Defenses."

§ 12. **Of the pleadings in an action.** Pleading has been defined to be "the statement, in a logical and legal form, of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense; it is the formal mode of alleging on the record, that which would be the support or defense of the party in evidence." In this work it is not intended to give the technical rules of pleading, nor the forms used in practice. These must be sought in works especially devoted to those subjects. See, also, 2 Wait's Pract. 285-509.

It will be remembered, however, that a full discussion of the right of action, and of the grounds of defense, will, in most cases, show what facts ought to be alleged either as a cause of action or as a matter of defense.

§ 13. **Of the evidence in an action.** This subject will be merely alluded to in this work, and full information must be obtained from works devoted to that subject, or from the reports and statutes. But notwithstanding the omission of a full discussion of the rules of evidence, there will be full information given as to the facts which must be established to support an action or to maintain a defense.

TITLE VII.

OF THE JURISDICTION OF ACTIONS.

ARTICLE I.

IN GENERAL.

Section 1. Definition and incidents. Jurisdiction is that power which the law confers upon courts, judges or other judicial officers to take cognizance of actions or proceedings, and to decide them according to law, and to carry their decision, decree or judgment into execution. The tract of land over which such jurisdiction is exercised is called the territorial jurisdiction. Jurisdiction is original, when it is conferred on the court or officers in the first instance. It is appellate, when an appeal may be taken from the decision or judgment of another court. It is concurrent, when it may be entertained by several courts; although it is a rule, in

these cases of concurrent jurisdiction, that the court which is first seized of the cause shall try it to the exclusion of the other. It is exclusive, when only one court has the right to try the suit, action, or matter in dispute. Assistant jurisdiction is that which is afforded by a court of chancery in aid of a court of law, as, for example, by a bill of discovery.

A court which takes cognizance of an action, and proceeds in it, decides in effect that it has jurisdiction, although such decision may not be announced in express terms. *Clary v. Hoagland*, 6 Cal. 685. And where a court has the parties before it, it must necessarily obtain jurisdiction so far as to decide whether it can entertain the suit or proceeding, that is, whether it has jurisdiction of the action. *King v. Poole*, 36 Barb. 242. See *Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co.*, 39 Barb. 16; 15 Abb. 78; *Humiston v. Ballard*, 40 How. 40; S. C., 63 Barb. 9.

Where jurisdiction is conferred in general terms, or for general or special purposes, the grant of such jurisdiction will carry with it all such legal incidents as are necessary and proper to secure the exercise of the authority. *Stief v. Hart*, 1 N. Y. (1 Comst.) 20; *Robbins v. Gorham*, 25 N. Y. (11 Smith) 588, 594; *Voorhees v. Martin*, 12 Barb. 508.

Where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities; they are not voidable but simply void. *People v. Sturtevant*, 9 N. Y. (5 Seld.) 263, 266; *Wilcox v. Jackson*, 13 Peters, 511.

"Usually where a court has no jurisdiction of a case, the correct practice is to dismiss the suit, but a different rule necessarily prevails in an appellate court in cases where the subordinate court was without jurisdiction and has given judgment or decree for the plaintiff, or improperly decreed affirmative relief to a claimant. In such a case the judgment or decree in the court below must be reversed, else the party which prevailed there would have the benefit of such judgment or decree, though rendered by a court which had no authority to hear and determine the matter in controversy." *United States v. Huckabee*, 16 Wall. (U. S.) 414, 435, 436, per CLIFFORD, J.

ARTICLE II.

COMMON-LAW JURISDICTION.

Section 1. Nature and origin. The origin of courts has been elsewhere sufficiently explained. And, in relation to the authority exercised by courts generally, but few remarks are required. In the creation of courts and in the delegation of judicial authority to them, it is impossible to enumerate all the instances in which such authority may be exercised. And when general rules of law have been established for the determination of the rights of person and of property, and general rules of practice have been adopted, it is left to the court by the aid of these rules of law and of practice to determine what cases are, and what not, within the jurisdiction of the court to which such case is submitted. And, in a vast number of the causes which have been decided by the courts, no other authority for their trial is to be found, except that conferred by the principles of the common law, or of those of courts of equity. In all such cases, where courts hear and determine those matters which are within the reason of the rule which organized them and gave them authority, it is an invaluable part of their powers that they may act without being required to point out a specific, express grant of power in the particular case; for if this could be exacted of them, the result would be to deprive them of a large share of the authority which they have exercised from time out of mind, and, by general consent, with the greatest advantage to society at large. If any one desires to know how extensively this practice has prevailed, let him briefly trace the source of those powers which are daily exercised by our supreme court in actions at law, or in suits in equity.

ARTICLE III.

CONSTITUTIONAL AND STATUTORY JURISDICTION.

Section 1. In general. That our higher courts were always similar to those of the English superior courts, and in the main founded upon them, is well known. And, since the establishment of our State government, the rule has been the same, since much of the English common law was adopted as a part of our system of laws. The jurisdictions of the supreme court, and of the court of chancery, have never been distinctly

pointed out, either in the constitutions or the statutes of this State. The first constitution treats these courts as existing, and mentions the chancellor and the judges of the supreme court, but does not declare or define the jurisdiction of these courts. Const. of 1777, article 16. By the constitution of 1821, article 7, section 13, the English common law was adopted. By article 7, sections 3, 4, 5, 6 and 7, provision is made in relation to the judges and chancellor, but their jurisdiction is not there defined. The constitution of 1846, article 7, section 3, provides for a supreme court, having general jurisdiction in law and equity. The judiciary act of 1847, chapter 280, section 16, declares that the supreme court shall possess the same powers and exercise the same jurisdiction as had formerly been possessed by the supreme court and the court of chancery.

By the Code of Procedure, section 10, the same jurisdiction is continued. The present constitution, article 6, section 6, continues the existing jurisdiction, and chapter 408 of Laws of 1870 provides for carrying the provisions of this constitution into effect.

From this brief review, it is readily seen that the civil jurisdiction of the supreme court extends to all actions or suits which are within the jurisdiction of the English courts of queen's bench, common pleas, exchequer, or the court of chancery. There are statutes which expressly confer or define the jurisdiction of the supreme court in specified cases. But, as a whole system, there are no constitutional or statutory provisions which clearly and explicitly declare or define the precise limits of the jurisdiction of this court in all cases, except in so far as a general reference or the character adopted may be said to be certain, since it refers to a system which is substantially well defined. The supreme court, as now organized, may be considered as possessing jurisdiction over all cases of a legal or of an equitable nature, and as competent to secure every right and to give every remedy or relief which the law guarantees to any person. There are a few exceptions to this general rule, but they need not be here specified.

ARTICLE IV.

JURISDICTION OF STATE COURTS.

Section 1. In general. Under a government like that of the United States, where there are several large States, and each possessing an extensive as well as exclusive jurisdiction within its limits, it may be laid down as a general rule that

the jurisdiction of each State does not extend beyond its territorial limits, and that within such limits its jurisdiction is exclusive. In relation to the United States courts there are exceptions to this general rule. So, too, the judgments of each State are entitled to respect and the aid of other States in carrying them into effect in such States when necessary. In most cases, a party who seeks a remedy against a resident of a particular State, or against his property situated within it, must apply to the courts of that State for the relief sought.

ARTICLE V.

SUPERIOR AND INFERIOR COURTS.

Section 1. In general. Those courts which have general jurisdiction in law or equity cases are usually termed superior courts, while those which have but a limited jurisdiction as to subject-matter, locality or persons, are called inferior courts. The proceedings of an inferior court may be as regular and its judgments as conclusive as those of a superior court. But the mode of establishing that fact is not always the same. A court of general or superior jurisdiction is presumed to have acted within its jurisdiction, and this presumption continues until the contrary is shown. The record of the proceedings of a superior court need not show affirmatively that it had jurisdiction, so far as the authority to act is concerned, when the question arises collaterally, but it is otherwise when the question arises by way of review for the correction of errors, and the question has been properly raised in due time. Limited or inferior courts have no jurisdiction except that specially conferred, or such incidental powers as may be included in the general delegation of the authority. And in such cases the records of their proceedings ought to show affirmatively on their face that the court had jurisdiction, except in those cases which permit extrinsic evidence for the purpose of establishing that fact. 2 Wait's Law and Pract. 21.

ARTICLE VI.

EXCLUSIVE OR CONCURRENT JURISDICTION.

Section 1. In general. The jurisdiction of any court is exclusive, when no other court can exercise the same powers in relation to the action. In some cases the United States courts

have exclusive jurisdiction, and the State courts have no authority to act in the matter. So, too, in reference to the several courts in a State, there may be an exclusive jurisdiction conferred upon one court to the exclusion of the other courts of the same State. The distinction between the powers of the superior and the inferior courts illustrates this point. Again, in those States in which courts of law and courts of equity are separate organizations, there are numerous instances in which each court has exclusive jurisdiction. This subject, however, is less important here, since the powers of the two courts are now exercised by the supreme court.

The jurisdiction of courts is concurrent, when each of several different courts has the same right to act in relation to its subject-matter, or as to the persons of the parties. There are many cases in which there is a concurrent jurisdiction in most respects, while there are few cases in which the powers of the court are identical. Within certain limits as to amount, and as to the locality of the parties, when an action for the recovery of money has been brought in a justice's court, it may be said to have exercised a jurisdiction concurrent with that of the supreme court as to the recovery of that amount. But, the most that can be properly said is, that the inferior court has a limited concurrent jurisdiction. There are also courts of record, such as the county courts, and other courts of record of cities, which exercise a jurisdiction concurrent in some respects with that possessed by the supreme court. But, in all such cases, while the inferior courts possess a limited concurrent jurisdiction in some respects, it cannot be said of any of them that their jurisdiction is in any other respect concurrent with that of the supreme court. There may be a concurrent jurisdiction as to some remedies, while in all other respects the jurisdiction is in no sense concurrent.

ARTICLE VII.

JURISDICTION OF SUBJECT-MATTER.

Section 1. In general. In actions in the supreme court there can seldom be any question as to the jurisdiction over the subject-matter of the action, since this court has general jurisdiction at law and in equity. But even this court is sometimes without authority to act, as in the case of an action to restrain the infringement of a patent right. *Dudley v. Mayhew*, 3 N. Y. (3 Comst.) 9. If the law does not confer jurisdiction

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over the subject-matter of the action, no consent given by the parties will be of any avail, even though there should be an express agreement not to raise the question. *Ib.* And the objection may be interposed at any time, since in that case there can be no waiver of it; but the judgment will be held entirely void at all times and in all places. See the cases cited in Wait's Code, 24, 25, 26.

Courts cannot be deprived of their jurisdiction by any agreement of the parties, as by an agreement that matters of difference arising out of a specified contract shall be submitted to arbitration. *Hart v. Lawman*, 29 Barb. 411; *Haggart v. Morgan*, 5 N. Y. (1 Seld.) 422. See 1 Wait's Law and Prac. 1013.

Nor can they by consent confer jurisdiction over the subject-matter of actions, where none is given by law. *Dudley v. Mayhew*, 3 N. Y. (3 Comst.) 9; *Beach v. Nixon*, 9 N. Y. (5 Seld.) 36; 2 Wait's Law and Prac. 15; *Avards v. Rhodes*, 8 Exch. 312; *Lawrence v. Wilcock*, 11 Ad. & E. 941; *Vansittart v. Taylor*, 4 E. & B. 910, 912.

ARTICLE VIII.

JURISDICTION OF THE PERSON.

Section 1. In general. Before any court can acquire jurisdiction over the person of the defendant, there must be some steps taken to bring him into the court. 2 Wait's Law and Prac. 11 to 15. No one can be lawfully condemned before he has had an opportunity to be heard. There is a material difference, however, between this case and that relating to the subject-matter of the action. In the latter case we have seen that consent cannot confer jurisdiction. But a defendant may waive an irregularity in the mode of bringing him into court, or he may appear and give jurisdiction over his person by consent. 2 Wait's Law and Prac. 17 to 20. Such waiver may be express, or it may be implied from his acts, by taking subsequent steps in the action without objection to the previous irregular or void proceedings. But for all practical purposes, a single remark is sufficient, as every careful practitioner will be certain to proceed in such a manner that no valid objection can be made in relation to the regularity of the steps by which the defendant has been proceeded against for the purpose of obtaining jurisdiction over his person or property.

It may be well to mention here that in case the defendant is

absent from the State, or is a non-resident, there may, in a proper case, be proceedings against such of his property as may be found in this State.

ARTICLE IX.

DISQUALIFICATION OF JUDGES.

Section 1. In general. The law declares in some cases, that a judge cannot sit as such on account of some matter personal to himself. Relationship to either of the parties is an instance of this kind. 2 R. S. 275, § 2. So of an interest in the cause of action, or where he is a party to the action. *Ib.* If he decided the cause in the court below, or took part in the decision, he cannot sit in the appellate court, in review of such decision. *Ib.*, § 3. Const., art. 6, § 8. See, also, *Real v. People*, 42 N. Y. (3 Hand) 270; 8 Abb. (N. S.) 314.

Where a judge is disqualified to sit in a cause, by reason of consanguinity to one of the parties, he cannot sit, even by consent of both parties, and if he does, the judgment will be vacated. *Oakley v. Aspinwall*, 3 N. Y. (3 Comst.) 547. See 2 Wait's Law and Prac. 21 to 28.

ARTICLE X.

JURISDICTION IN SPECIAL CASES.

Section 1. In general. There are numerous cases of actions and special proceedings in which the jurisdiction is expressly conferred by statute.

ARTICLE XI.

OF RAISING OR WAIVING THE OBJECTION.

Section 1. In general. Where the court has no jurisdiction over the subject-matter of the action, an objection may be taken at any time; but, where the objection relates to the person of the defendant, he may waive any irregularity in the mode of bringing him into court; and, when once waived, the jurisdiction of the court over his person will be complete. Such waiver may be express or implied, and if the defendant proceeds in the action by pleading, or taking other steps therein, his conduct will amount to a waiver of all objections of that kind; and, if a party would avail himself of such objections, he must act promptly in raising them, and be careful not to waive them by any subsequent acts on his part. See 2 Wait's Law and Prac. 19, 20.

TITLE VIII.

OF REMEDIES WITHOUT ACTION.

ARTICLE I.

OF PREVENTIVE MEASURES.

Section 1. In general. Courts of justice are instituted in every civilized society for the purpose of securing an effectual redress of private injuries, by protecting the weak from the insults of the stronger, and by expounding and enforcing those laws by which rights are defined and wrongs prohibited. This remedy is principally to be sought by an application to these courts of justice by means of a civil suit or action. But, as there are certain injuries of such a nature that some of them furnish, and others require, a more speedy remedy than can be had by the ordinary forms of justice, there is allowed, in any such case, an extrajudicial remedy without the aid of the courts. In many cases the most speedy justice afforded by the courts could not adequately supply the absence of such immediate and necessary remedies, nor could the natural impulse of self-defense against sudden and immediate aggressions be restrained. The law, therefore, permits parties to adopt certain modes of resistance, and merely interferes to modify and regulate the means employed. Laws for the prevention of injuries are sometimes better than those for compensation or punishment, as they prevent loss to the individual, and the necessity of prosecuting the wrong-doer at the risk of his being utterly unable to make compensation, or even to reimburse the expenses of legal proceedings against him. Preventive remedies may be variously divided, and for the purpose of convenient discussion they will be presented in the order adopted in this title.

ARTICLE II.

DEFENSE BY RESISTANCE.

Section 1. In general. Self-defense is one of the first and strongest impulses of our nature. And the law respects the passion of the human mind so far as to render it lawful for him to do himself that immediate justice to which he is prompted

by nature, and which no prudential motives are strong enough to restrain. The future process of law may be by no means an adequate remedy for an injury accompanied by force; and it is impossible to say to what lengths of rapine or cruelty an outrage of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. 3 Broom & Had. Com. 3; *id.*, vol. 2, p. 2, Wait's ed., and notes 427, 428. Self-defense, therefore, as it is justly called the primary law of nature, so is not, neither can it be in fact, taken away by the laws of society. *Ib.*

ARTICLE III.

DEFENSE OF THE PERSON.

Section 1. In general. The strongest justifiable act of defense is the killing of the aggressor, and which of course includes battery, wounding and mayhem, or a minor damage. The general rule is, that a homicide may be committed for the prevention of any forcible and atrocious crime, which would, if completed, amount to a felony, and under the circumstances, a mayhem, wounding or battery would be equally justifiable.

Self-defense is also equally justifiable when a person is illegally attacked, although the aggressor may not intend to commit a felony. But the party defending ought not to permit his resistance to exceed the bounds of defense and prevention, for if he does, he may become himself an aggressor. See the last section and cases referred to.

ARTICLE IV.

DEFENSE OF PERSONAL PROPERTY.

Section 1. In general. A man may repel force by force in defense of his personal property, and justify homicide against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, as robbery; but this rule does not extend to the case of a pickpocket, for that would not be a case of forcible felony. 1 Chit. Gen. Pr. 597. When one person has unlawfully entered upon the premises of another and possessed himself of the goods of the owner, the latter or his agent may, while upon his own premises, prevent the wrong-doer from taking such goods away, and may lawfully use so much force as may be necessary to retain his property and prevent its

removal out of his custody and beyond his reach. The law does not oblige the owner of property to stand idly by and see a thief or trespasser take his property from his premises, or limit him to mere verbal remonstrance. He may act promptly, and whether he may use force or not in the first instance, and what degree of force depends upon the exigency of the particular case. *Gyre v. Culver*, 47 Barb. 592. The mere taking of the property by the owner, under such circumstances, from the custody of the wrong-doer, without other force or violence, does not constitute an assault and battery. And if the taking, or the attempt to take, is resisted by the trespasser, and he persists in his attempt to retain possession and to carry the property off, then the owner may lawfully use so much additional force as may be necessary to prevent it. *Ib.* But, even in such a case, the force must not exceed that necessary for the defense of the property. And where the plaintiff took hold of a rake in the defendant's hands in order to take it from him, upon which the defendant immediately knocked the plaintiff down with his fist, this was held to be an unlawful act. *Scribner v. Beach*, 4 Denio, 448.

ARTICLE V.

DEFENSE OF REAL PROPERTY.

Section 1. In general. A person may lawfully defend or protect the possession of real property, and if the assailant is attempting to commit a forcible felony, such as burglary, arson, or the riotous demolition of a house, the party in possession may resist even to the extent of taking the life of the felonious assailant. So where a forcible attack is made upon a dwelling-house, but without any felonious intent, and for the purpose of committing a mere trespass, it is, as a general rule, lawful to oppose force by force when the former is illegal. In such cases a party may justify a battery, by showing that he committed it in defense of his possession, as for instance to remove a trespasser out of his close or house, or to prevent him from entering it, or to restrain him from taking or destroying his goods; but the battery must here be limited to only that degree of violence and the use of such weapons only as may be absolutely essential to effect the object, and no more. A possession in fact, of land, will justify the possessor in using violence, if necessary, in order to defend his possession; but a mere right to the possession will not justify a person in commit-

ting an assault and battery upon another, for the purpose of reducing his right to actual possession. *Parsons v. Brown*, 15 Barb. 590. See, also, *Sage v. Harpending*, 49 id. 166 ; 34 How. 1 ; *Corey v. People*, 45 Barb. 262.

When the entry upon lands is made with no more force than that termed implied force, or force in law, there ought to be a request by the lawful possessor that the wrong-doer depart from the premises before a resort to actual force is employed for his removal. If he refuses to leave, then gentle force may be used ; and, if he still resists, then such force as may be necessary may be employed. When the entry is forcible, it is lawful to use force against force without a previous request to depart. The distinction between an entry with actual force, and an entry with only implied force, with regard to a trespass on land, has been settled law from an early period.

A mere trespass on land, or that of the property therein, is not such an act as justifies the owner in making use of a dangerous or a deadly weapon. There are several methods of protecting property, as by dogs and by instruments dangerous to trespassers, and information relating to cases of that kind will be hereafter given.

ARTICLE VI.

DEFENSE OF OTHERS.

Section 1. In general. The principle which sanctions the defense of one's own person is extended to certain other peculiar relations. Thus husband and wife, parent and child, master and apprentice, and master and servant are legally excused, and sometimes even justified, in killing an assailant who is about to commit a forcible felony upon the other, when such homicide has been committed in the necessary or lawful defense of each other ; the act of each of those relations being then construed the same, and equally permitted as the defense of the party himself. 1 Chit. Gen. Pr. 613. This principle extends still further, for, if a felonious attack is made upon an individual, then any other person, though not a relative, may lawfully interfere to prevent the mischief intended, and, if in so doing, death ensues, he will, in that case, be justified. *Ib.* But with regard to mere trespasses, there is a very material difference between the interference of certain relations and of mere strangers. The former may justify immediate resistance with force when necessary, but a stranger can only interfere moder-

ately, and with gentle hand to prevent the wrong. *Ib.* A mere stranger cannot justify an interference with force in the first instance to prevent a battery of a third person or any other trespass or civil injury, where death or any felony is not likely immediately to occur, but must proceed more moderately, and should previously declare or signify that he interferes merely to preserve the peace and not as a partisan, and he can only justify the gently laying on of his hands to prevent a breach of the peace; though afterward, if he be himself attacked by either party, he may then defend himself with the same degree of force as if he had been originally illegally assailed. *Ib.* 615.

ARTICLE VII.

APPREHENDING CRIMINALS AND WRONG-DOERS.

Section 1. In general. One of the most immediate and effectual means of preventing an injury or securing punishment for its completion is the apprehension and detention of the wrong-doer while in the act of committing the offense; or in the case of a felony when he is escaping; and, also, of seizing his engines or implements about to be used and then using for the wrongful purpose. In such cases an arrest may be made without waiting for a criminal warrant, for, if it were necessary to wait for that process, many unknown and transient offenders would escape. In most cases of mere civil injuries without force, or even for a breach of the peace, as an assault and battery, no private individual can, at common law, arrest, apprehend or imprison the wrong-doer, but can at most remove him from his house without any imprisonment.

But private individuals are not only permitted, but enjoined, by law, to arrest an offender when they are present at the time when a felony is committed or a dangerous wound given, and when they witness the same, on pain of fine or imprisonment, if the wrong-doer should escape through their negligence.

In cases of misdemeanor, a private person cannot, at common law, apprehend another after the misdemeanor or breach of the peace is over, without a warrant, unless he had a view of the misdemeanor or breach. As the cases are very numerous in which arrests may be made without warrants, no enumeration will be here attempted.

It may, however, be stated, that when it is doubtful whether a party has committed a felony, the safer rule will be to procure

a warrant for his arrest, since, in that case, the party arrested, although innocent, cannot maintain an action unless the charge was maliciously made against him without reasonable cause. When a private person has apprehended a supposed offender, he ought immediately, or as soon as practicable, to deliver the prisoner to a constable, or convey him before a magistrate, or to the county jail.

ARTICLE VIII.

RESISTANCE OF PROCESS, ESCAPES, RESCUES, ETC.

Section 1. In general. When persons having lawful authority to arrest, apprehend, or imprison, or otherwise to advance or execute the public justice of the State, either civil or criminal, and using the proper means for that purpose, are resisted in so doing, not only is such resistance of itself illegal and punishable at common law, but if the party illegally resisting, or any other assisting him, be killed in the struggle, such homicide is justifiable; while on the other hand, if the party having such authority, and executing it properly, happen to be killed, it will, at common law, be murder in all who take part in such resistance. 1 Chit. Gen. Pr. 633.

But it will be found that the common law, and all statutes upon the subject, either expressly or impliedly, suppose that the arrest or imprisonment has been lawful, and therefore an indictment or prosecution for the resistance, or rescue, or prison breaking, must show the nature and cause of the imprisonment from which the party escaped or was rescued, in order that it may appear that the rescue or escape was illegal. Ib. 634.

When the attempted arrest is without legal authority, it is lawful for the party thus threatened with arrest to resist in self-defense, though he ought not to use any dangerous or deadly weapon for that purpose. And if arrested he may lawfully escape or be rescued, or even break prison, and others may assist him in so doing. Ib. 635. But when the process or arrest has a semblance of legality and regularity, the prudent course will be not to resist its execution, as there are proper and efficient modes of obtaining relief from an illegal imprisonment.

ARTICLE IX.

RECAPTION OF PERSON OR PROPERTY.

Section 1. In general. Recaption or reprisal is another species of remedy by the mere act of the party injured. This happens, when any one has deprived another of his property in goods or chattels personal, or when he detains one's wife, child or servant; in which case, the owner of the goods, the husband, parent or master, may lawfully claim and retake such property in person, wherever found, provided it is not done in a riotous manner, or attended with a breach of the peace. The reason of this is obvious, since the owner may not have any other opportunity of doing himself justice, as his goods might be afterward conveyed away or destroyed, and his wife, child or servant concealed or carried out of his reach, if he had no speedier remedy than the ordinary process of law.

The public peace, however, must be considered rather than any one man's right of property, and since, therefore, if private individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease. The strong would give law to the weak, and every man would revert to a state of nature. For these reasons, it is provided that this natural right of recaption shall never be exerted when such exertion must occasion strife and bodily contention, or endanger the peace of society.

§ 2. Recaption of the person of a relative. When a wife, child or an apprentice, has been taken away wrongfully by the party withholding either, the person entitled to the custody may at once, and without any formal request or demand, peaceably enter the house of the wrong-doers, the outer door being open, and carry away the party wrongfully detained. But such recaption cannot be legally effected in a riotous manner, nor should it be attended with a breach of the peace; but, although a forcible entry were made, and the party might be liable to an indictment for such breach of the peace, yet, unless some actual injury were committed to the person or property of the original wrong-doer, he could not sustain any civil action in respect of the forcible manner of regaining the wife, child or apprentice. If the recaption be resisted by force, the proper mode of procedure will be to apply for a writ of *habeas corpus*.

§ 3. Recaption of personal property. The same general principles govern this case as in those last referred to. In many

cases a recaption of personal property may be the best, or indeed the only remedy, as when one joint tenant, or tenant in common, takes a chattel and assumes the exclusive possession, in which case no action at law would lie, and, therefore, the only remedy would be for the co-owner to retake the possession.

If a party has been wrongfully dispossessed of his personal property, he may in general justify the retaking of it from the house and custody of the wrong-doer, even without a previous request to re-deliver it; for the violence which happens through the resistance of the wrongful taker being attributable to his own tortious act, deprives him of any right to complain; and the owner of personal property may retake the same, with a moderate degree of force, from a person wrongfully refusing to deliver the same up to him. *Burridge v. Nicholets*, 6 H. & N. 389. See *Blades v. Higgs*, 11 H. L. Cas. 621; *Smith v. Wright*, 6 H. & N. 821. But in this recaption, care must be observed to avoid any personal injury, in any forcible entry or breach of the peace, and if either be anticipated, then the owner of the goods should replevy them, or resort to an action, rather than subject himself to a proceeding for the personal injury, or an indictment for a breach of the peace.

If the personal property was not originally illegally seized, but is merely wrongfully detained, then the owner must first request a re-delivery, and he cannot justify more than gently laying his hands on the wrong-doer in order to recover it; nor can the owner, without leave, enter the door of a house of a third person, not privy to the wrongful detainer, or take the goods therefrom; and the same doctrine extends to the land of a third person. *Patrick v. Colerick*, 3 M. & W. 486; *Anthony v. Haneys*, 8 Bing. 186.

Another general rule is, that the natural right of recaption should never be exerted where such exertion would occasion strife and bodily contention, or endanger the peace of society. The right of retaking goods fraudulently purchased, but not paid for, or of stopping them in transitu, is of the same general nature. See 1 Chit. Gen. Pr. 645.

§ 4. **Recaption or re-entry on real property.** As recaption is a remedy given to the party himself for an injury to his personal property, so a remedy of the same kind for an injury to real property is sometimes permitted by entry on lands and tenements, when another person without any right has taken or retains possession thereof. This depends in some measure on

like reasons as the former ; and like that, too, must be peaceable and without force or violence which might endanger the public peace. There is some nicety required in defining and distinguishing circumstances in which such entry might be lawful or otherwise, and especially in determining whether notice should be given before re-entry and eviction to the person who is wrongfully in possession. 3 Broom & Had. Com. 5 ; id., vol. 2, p. 4, Wait's ed.

If the owner enters by force he may be indicted for a breach of the peace, but he will retain the lawful possession of his estate, and the original wrong-doer cannot maintain a civil action for such regaining of the possession, so far as it regards any alleged injury to the house or land, or for the expulsion. *Willard v. Warren*, 17 Wend. 257 ; *Winter v. Stevens*, 9 Allen (Mass.), 526 ; *Krevel v. Meyer*, 24 Mo. 107 ; *Newton v. Harland*, 1 M. & Gr. 644 ; *Harvey v. Brydges*, 14 M. & W. 437 ; 1 Exch. 261. The party thus turned out may, however, maintain an action for any unnecessary personal injury which he may have sustained, or for any damage to his furniture which could have been avoided. And he may, in some cases, resort to proceedings under the statute relating to forcible entries and detainers. *People ex rel. Kearney v. Carter*, 29 Barb. 208 ; *People ex rel. Gault v. Van Nostrand*, 9 Wend. 50 ; *Jackson d. Stansbury v. Farmer*, id. 201.

But he cannot maintain this proceeding if he has no right of possession of such premises. *People ex rel. Cooper v. Fields*, 1 Lans. 222 ; S. C., 58 Barb. 270 ; *People ex rel. McInroy v. Reed*, 11 Wend. 157. Upon the question of a right to maintain proceedings for a forcible entry and detainer in such a case, the authorities are not entirely in harmony.

ARTICLE X.

ABATEMENT OF NUISANCE.

Section 1. In general. Another species of remedy by the mere act of the party injured is the abatement or removal of a nuisance. It may be observed, generally, that whatsoever unlawfully annoys or does damage to another is a nuisance, and such nuisance may sometimes be abated, that is, taken away or removed, by the party aggrieved thereby, provided he does not commit any riot in doing it. Nuisances may be public or private. A public or common nuisance is such an inconveni-

ence or public offense as annoys the whole community in general, and not merely some particular person.

A private nuisance is any thing unlawfully and tortiously done to the hurt or annoyance of the person, or of the lands, tenements or hereditaments of another.

§ 2. **Private nuisances.** The reason why the law allows the abatement of a nuisance, private or public, by any individual annoyed by it, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice. To enumerate, in this place, the instances in which a party may abate a private nuisance, is not intended, but merely to state some of the general rules recognized by law, and to be observed by the parties resorting to this mode of relief.

Where a nuisance was occasioned by the tortious misfeasance or malfeasance of another, the party thereby injured may, in general, abate the nuisance immediately, and without any previous notice or request; but if the nuisance be merely continued by a party who did not erect it, or when it consists in the omission of a party, he ought to be requested to remove it before the party injured can himself remove the injury; for nuisances, by an act of commission, are committed in defiance of those whom such nuisances injure, and the injured party may abate them without notice to the person who committed them. *Jones v. Williams*, 11 M. & W. 176. But the law does not sanction the abatement by an individual of nuisances from omission, except that of cutting branches of trees which overhang a public road or the private property of the person who cuts them; or removing obstructions from a public highway, where special injury is done to the party so abating it. *Northrop v. Burrows*, 10 Abb. 365. See, also, *Rogers v. Rogers*, 14 Wend. 131; *Griffith v. McCullum*, 46 Barb. 561; *Howard v. Robbins*, 1 Lans. 63. In removing a private nuisance, care should be taken not to abate more or to go further than to restore the party injured to the enjoyment of his right as it existed before the nuisance was created; for, if a party goes beyond this, and unnecessarily injures or destroys the property constituting such nuisance, he will be guilty of an illegal act. *Ib.* See 1 Wait's Law & Prac. 748 to 754.

A house which is wrongfully built upon a common, and which obstructs the right of common, may, after notice and request by a commoner to remove from the house, be pulled down, although

the builder and his family were actually inhabiting and present in the house. *Davies v. Williams*, 16 Q. B. 546. See *Perry v. Fitzhove*, 8 id. 757. So of a person who enters upon the lands of another, and unlawfully builds a house. *Burling v. Read*, 11 Q. B. 904; *Davison v. Wilson*, id. 890.

§ 3. **Public nuisances.** Private citizens are permitted, in many cases, to abate public nuisances without the interposition of any legal authority. It is clear that any one may, in some cases, justify the removal of a common nuisance, whether on land or on water. If a gate or wall be erected across a public highway, so as to constitute a common nuisance, then any person passing along such highway may tear it down or destroy it if necessary to restore the highway to its proper condition for his passage along it. *Northrop v. Burrows*, 10 Abb. 365. But he cannot lawfully do any needless injury to such property, even though it be in a public highway, for if he wantonly or unnecessarily destroys it he will be liable to an action. *Rogers v. Rogers*, 14 Wend. 131; *Goldsmith v. Jones*, 43 How. 415; *Strickland v. Woodworth*, 3 N. Y. S. C., T. & C., 286.

A fence so built as to encroach upon a public highway is a public nuisance, and yet, if there is sufficient room for persons to travel along such highway, it will be an unlawful act for a traveler or other person to remove or destroy such fence. *Griffith v. McCullum*, 46 Barb. 561; *Harrower v. Ritson*, 37 id. 301; *Peckham v. Henderson*, 27 id. 207; *Howard v. Robbins*, 1 Lans. 63. It is not every nuisance that may be removed by a private person, for although a fence is so far an encroachment upon a public highway as to constitute a public nuisance, yet an individual cannot lawfully remove it unless it prevents his passage along such highway. *Ib. Dimes v. Pelley*, 15 Q. B. 276; *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 244; *Davis v. Mann*, 10 id. 548; *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Bateman v. Bluck*, 18 id. 870; *Roberts v. Rose*, 3 H. & C. 162; L. R., 1 Ex. 82.

ARTICLE XI.

DISTRESS AND SEIZURE OF CATTLE.

Section 1. In general. The taking of cattle or chattels, as a distress, whether damage feasant or for rent, where that is permitted, or for other claims, is also one of those remedies permitted by law. See 1 Wait's Law and Prac. 788 to 791.

§ 2. **Damage feasant.** When the animals of one person unlawfully go upon the lands of another person and there do damage,

as by treading down the grass, grain or other productions of the earth, the owner of such land may unlawfully seize such animals instead of bringing an action for the trespass. This remedy exists at the common law, but it is frequently modified or regulated by statutes. See 2 R. S. 517 to 521. Some of the rules to be observed in pursuing this remedy will be briefly noticed. If a party elects to distrain cattle or chattels damage feasant, he must follow strictly the course pointed out by the statute.

No one ought to distrain cattle damage feasant unless he has the legal title or the right to the possession of the land upon which they are found.

The remedy by distress, given by the statute, is cumulative, and the distrainer may, if he pleases, pursue the common-law remedy by action of trespass. Before making a distress, the party should consider whether the trespass was not justifiable by reason of his own omission to keep his fences in repair. The cattle must be taken while actually upon the land and in the very act of doing damage, and not after it is over, or at least not after they have escaped from the land, even though the owner of the land was pursuing them, and the owner of the cattle drove them off for the purpose of preventing the distress.

A horse cannot be distrained if there be a rider upon him at the time. *Storey v. Robinson*, 6 Term. R. 138. Nor can a horse and cart be so taken, if, at the time of distraining them, they are in the actual possession, care and use of the party driving them. *Field v. Adames*, 12 Ad. & E. 649.

The cattle taken cannot legally be impounded after an adequate tender of amends made before impounding.

Again, the cattle distrained must not be beaten or wounded, or worked, or used. For, doing either of these acts would render the party distraining liable to an action.

The manner of disposing of a distress is pointed out in this State by statute. 2 R. S. 517 to 521.

The statutes relating to cattle running in public highways will be found, Laws 1862, ch. 459; Laws 1867, ch. 814; Laws 1869, ch. 424; Laws 1872, ch. 776.

For some of the decisions upon the question see *Rockwell v. Nearing*, 35 N. Y. (8 Tiff.) 302; *Campbell v. Evans*, 54 Barb. 566; 45 N. Y. (6 Hand) 356; *Fox v. Duncle*, 55 Barb. 431; 38 How. 136; *Leavitt v. Thompson*, 56 Barb. 542; S. C. reversed, 52 N. Y. (7 Sick.) 62; *McConnell v. Van Aerman*, 56 Barb. 534; *Squares v. Campbell*, 41 How. 193.

ARTICLE XII.

RETAINER, REMITTER AND LIEN.

Section 1. Retainer. Retainer is the act of withholding what a party has in his hands by virtue of some right. An executor or administrator has, in some cases, a right to retain a debt or sum due him from the estate, or the testator or intestate. A sole executor may retain in those cases where, if the debt had been due to a stranger, the latter might have sued and recovered the sum of such executor, whether the debt were due to himself or due to him in right of another, or to another in trust for him. If there are several executors, and one of them has a claim against the estate of the deceased, he may retain it with or without the consent of his co-executors; and if there are several creditors among the executors, each of the same degree, and the estate is insolvent, they may retain *pro rata*.

The right of retainer may be exercised where the deceased was bound alone, where he was bound with others, and where the executor or the obligee is also executor of the obligor.

As there is quite a diversity in the practice of different States and countries in relation to the priority of claims, there will be no attempt at an enumeration of them. Funeral expenses and physicians' bills usually have a preference over other claims.

Where the nature of the claim is arbitrary and unascertained, as in the case of a claim for damages for a tort, there cannot be a retainer; but, where the claim is for damages for the breach of a pecuniary contract, there may be a retainer, as there is a certain measure of damages. An executor is not bound to plead the statute of limitations against a just debt, and therefore that statute does not operate against his claim.

In case the estate is insolvent, the executor's right to retain is limited by the rights of other creditors who are equally entitled with himself to payment. At common law a creditor obtained an advantage by obtaining the first judgment against an executor and, as an executor could not sue, he might retain his whole claim in preference to other creditors. This rule is abrogated in some of the States, and is in force in others.

§ 2. Remitter. This takes place when he who has the true property in lands is out of possession and has no right to enter without recovering possession in an action, but afterward has the freehold cast upon him by some subsequent, though of

course, defective title. In this case he is remitted or put back, by operation of law, to his ancient or more certain title. This right of entry which he has gained by a bad title is, *ipso facto*, annexed to his own inherent good one, and the defeasible estate is utterly defeated and annulled by the instantaneous act of law without his participation or consent. The reason assigned for this rule is, that, being so remitted, the owner has no means of asserting his title, because, being in possession, he cannot sue himself, and, to prevent his loss, the law places him in the same situation as if he had established his right by action or suit. But, to enable the owner of the land to take advantage of this principle, the title must be cast upon him by the law, as by descent; for, if he undertakes to buy the subsequent estate or right of possession, he is considered as having waived his prior right, and therefore he is not remitted. Whenever this right of remitter exists, it takes place regardless of the will or intention of the party benefited. He is remitted *nolens volens*. But there is no remitter to a right which is extinguished, or for which the party has no right of action, as in the case of a claim barred by the statute of limitations. See *Doe d. Daniell v. Woodroffe*, 10 M. & W. 608; 15 id. 788; 2 H. L. Cas. 811.

§ 3. **Lien.** A lien, when considered as a remedy in the hands of the party, may be defined as the right of detaining the property of another until some claim is satisfied. There may be liens which arise by operation of law, or which are created by the express agreement of the parties. A right to retain property in respect of money or labor expended on some particular property is a particular lien. A general lien is one which binds all the property of the debtor which may happen to be in the hands of his creditor. The general rule is, that a party, who is in possession of property by virtue of a valid lien, may retain the possession until his claim is paid. This claim may be lost or waived by any act of the parties by which it may be surrendered or become inapplicable.

In general, possession is not only essential to the creation, but also to the continuance, of the lien; it may, therefore, be lost by voluntarily parting with the possession of the goods.

The right of the holder of the lien is generally confined to the mere right of retainer. Whether an authority to sell exists, is a matter to be carefully examined before exercising any such power. In some cases a court of equity will decree a sale to satisfy such lien. See "Lien."

ARTICLE XIII.

REDRESS BY JOINT ACTS OF THE PARTIES.

Section 1. In general. There are two remedies which may be secured by the joint act of both parties, and thus obviating the necessity for an action. One is by an accord, and the other by arbitration. These will be briefly noticed in their order.

§ 2. **Accord.** An accord is the settlement of a dispute, or the satisfaction of a claim, by an executed agreement between the party injuring and the party injured. Some of the requisites of an accord are the following: It must be legal; it must be advantageous to the party claiming the performance of a contract, or damages for an injury; it must be certain; the defendant must be privy to the contract, as an accord from a stranger is not sufficient; the accord must be executed, for until then it is no satisfaction; the acceptance of a collateral thing of value is a good satisfaction; so is a mutual agreement to discontinue two cross-actions. An agreement to pay a less sum of money in discharge of a larger money debt is not a good accord, unless the money is paid before the larger sum was due, or at a different place. The effect of a valid accord and satisfaction is to discharge the claim made, and to bar any future action upon it. See 1 Wait's Law and Prac. 1036 to 1042, and see "Arbitration."

§ 3. **Arbitration.** An arbitration is a submission and reference of a matter in dispute concerning property, or in relation to a personal wrong, to the decision of one or more persons, called arbitrators, who are to render a judgment thereon, called an award. The general subject of arbitrations will be explained elsewhere and the subject will be dismissed, with the general remark, that a valid submission and a proper award thereon will bar any action upon the claim submitted and passed upon. See 1 Wait's Law and Prac. 1011 to 1036; and see "Arbitration."

ARTICLE XIV.

REDRESS BY OPERATION OF LAW.

Section 1. In general. A part of the remedies of this nature have already been noticed under another head. See Retainer; Remitter; Lien.

§ 2. **Set-off.** The right of a party to set off his demand against the claim of another person against him did not exist at common

law. The principle of set-off is, that when one man has a claim for a sum of money against another, and is also indebted to him, he may consider his claim to be a discharge or extinguishment of his debt, if it be equal in amount, or *pro tanto*, if unequal. This rule is founded upon reason and justice, and it tends to prevent the unnecessary multiplication of suits with their attendant inconveniences and costs. As the subject of set-off will be fully explained in this work, no further notice is here necessary, except to state that the right, as it now exists, is founded upon various statutes. See, also, 1 Wait's Law and Prac. 966 to 979, and "Set-off."

§ 3. **Marriage of debtor and creditor.** By the common law, if a woman married her creditor or her debtor, in either case the debt was absolutely extinguished. No discussion of this matter is to be expected here, as the mere mention of it will call attention to this subject, which is all that is needed.

ARTICLE XV.

CACTIONS IN RELATION TO RESORTING TO THESE REMEDIES WITHOUT ACTION.

Section 1. In general. It is to be remembered that although the law allows an extrajudicial remedy, yet that remedy is not compulsory, and does not exclude the ordinary course of justice; it is only an additional weapon put into the hands of persons in particular instances, when natural equity or the peculiar circumstances of their situation require a more expeditious remedy than the formal process of a court of judicature can furnish. In many cases the party may resort to both remedies. A party who is assaulted may defend himself from violence and yet may afterward bring his action for the assault. A person may retake his goods in a fair and peaceable way, and the recaption does not bar his subsequent action, although the return may mitigate damages. A party may enter on lands, if he has a right of entry, or may demand possession by action. So he may abate a nuisance or call upon the law to do it for him. There is one general consideration which ought always to be borne in mind, and that is, there are cases in which a resort to these remedies, by the act of the party, will bar him from bringing a subsequent action for the same subject-matter.

As this title was designed to be a mere statement of general rules for the information of the student, and for the convenience of the practitioner, rather than a treatise upon the topics men-

tioned, the reader will be required to examine the other parts of this work whenever it may become important to examine the law applying these rules to any particular case.

TITLE IX.

OF EXTRAORDINARY REMEDIES WHICH ARE NOT USUALLY TERMED ACTIONS.

ARTICLE I.

OF MANDAMUS.

Section 1. In general. The writ of mandamus has long been an efficient mode of enforcing the prompt discharge of duties by natural persons, corporations, or inferior courts, by requiring them to do some particular thing specified in the writ which pertains to their office or duty. It is, in some cases, one of the most valuable remedies that the law has placed in the hands of the courts. The cases in which the writ will be granted or refused will be fully discussed in a subsequent place in this work. See Mandamus ; see, also, 5 Wait's Prac. 548-602.

ARTICLE II.

OF INJUNCTIONS.

Section 1. In general. An injunction may be defined as a judicial writ or order, commanding a party either to do a particular thing or to refrain from doing a particular thing according to the equities of the case in which it is employed. It is, in general, a prohibitory writ or order, issuing from the equity side of the court, restraining a party or parties from doing, in person or by agent, any act which appears unjust or inequitable so far as it regards the rights of the party in whose behalf the writ or order issues. See the title "Injunction," and also, 2 Wait's Prac. 1-128.

ARTICLE III.

OF PROHIBITION.

Section 1. In general. An injunction, when granted to restrain proceedings in another court, resembles, in some particulars, a writ of prohibition, but differs from it essentially in the mode of application.

A prohibition is a remedy against an encroachment of jurisdiction; issues only from a superior court; is granted on the suggestion that the court to which it is directed has not the legal cognizance of the cause; and it is directed to the judge of the inferior court, as well as to the parties to the cause. See title "Prohibition," also 2 Wait's Prac. 1, and 5 id. 603-612.

ARTICLE IV.

OF QUO WARRANTO.

Section 1. In general. This writ is issued for the purpose of inquiring by what right a person or a corporation claims an office or a franchise. See further, title "Quo Warranto," and also 5 Wait's Prac. 613-632.

ARTICLE V.

OF CERTIORARI.

Section 1. In general. In this State the writ of *certiorari* is both a common-law and a statutory process. See 5 Wait's Prac. 455-500, and title "Certiorari."

ARTICLE VI.

OF INTERPLEADER.

Section 1. In general. Interpleader is that remedy which is given to a person standing in the position of a mere stakeholder, against whom two or more persons severally make claim for the same thing, under different titles, or in separate interests; and who, not knowing to which of the claimants he ought of right to render the debt or duty claimed, or to deliver the property in his custody, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties; and who, therefore, applies to the court, not only to protect him from being compelled to pay or deliver the thing claimed to both the claimants, but also from the vexation attending upon the suits, which are, or may be, instituted against him upon the deposit in court of the thing claimed. See, further, 1 Wait's Prac. 165-180; and, also, *post*, title "Interpleader."

CHAPTER II.

OF SOME OF THE GENERAL PRINCIPLES OF THE LAW
RELATING TO ACTIONS FOUNDED UPON CONTRACT,
UPON EQUITIES, UPON LEGAL DUTIES, OR UPON
TORTS; OR RELATING TO DEFENSES TO ACTIONS.

TITLE I.

OF SOME OF THE GENERAL PRINCIPLES OF CONTRACTS.

ARTICLE I.

DEFINITION.

Section 1. In general. A contract is a deliberate engagement between competent parties, upon a legal consideration, to do, or to abstain from doing, some act. 1 Story on Cont., § 1. "A contract, in legal contemplation, is an agreement between two or more parties, for the doing or the not doing of some particular thing." 1 Pars. on Cont. 6. The essentials of a contract, as stated by Comyn, are, 1st. A person able to contract; 2d. A person able to be contracted with; 3d. A thing to be contracted for; 4th. A good and sufficient consideration; 5th. Clear and explicit words to express the contract; 6th. The assent of both contracting parties. These general views may be thus expressed. A contract is an intelligent, deliberate, and voluntary transaction or agreement, express or implied; founded upon a sufficient legal consideration; between two or more parties legally competent to contract; to do or to omit the doing of some legal act or thing, expressed in the terms of the agreement, or implied by or resulting from them by implication of law. See 1 Chit. on Cont. 11.

Every contract includes a concurrence of intention between two parties, one of whom promises something to the other, who on his part accepts such promise; but it does not necessarily include a mutuality or reciprocity of contract and liability. There must be at least two parties to every contract, a promisor or party making the promise, and a promisee or party to whom

the promise is made; but there may be only one contracting party. Thus, if A. promises to pay B. the price of goods to be sold by the latter to C., B. contracts no obligation to sell goods to C., though, if he does, the liability of A. attaches, and his engagement becomes absolute and binding. Add. on Cont. 2. And where, by the terms of an agreement between A. and B., in consideration that A. will pay certain notes upon which he is an indorser, B. agrees to pay him a certain sum, although there be no obligation upon A. to pay the notes, and therefore no mutuality in the contract, yet if he does pay them, he furnishes a consideration for the agreement and may enforce it against B. *L'Amoureux v. Gould*, 7 N. Y. (3 Seld.) 349; *Sanders v. Gillespie*, 59 id. (14 Sick.) 250. Where a merchant agrees, that, if a purchaser will buy goods of him, he will sell them to such purchaser at as low prices as he, the merchant, sells the same goods to other buyers; and, on the faith of such promise, the purchaser buys large quantities of goods and pays the prices named by such merchant, who has sold similar goods to other buyers at lower prices, an action will lie by such purchaser to recover the amount overpaid, even though the purchaser did not agree to purchase any goods of such merchant. *Holtz v. Schmidt*, 59 N. Y. (14 Sick.) 253. Such a promise, although invalid when made, for want of mutuality of obligation, will still become valid and binding upon a performance by the promisee of that in consideration of which such promise was made. *Willetts v. Sun Mutual Ins. Co.*, 45 N. Y. (6 Hand) 45; 6 Am. Rep. 31; *Adams v. Honness*, 62 Barb. 326; *Hammon v. Shepard*, 40 How. Pr. 452; 29 id. 188; *Cope v. Albinson*, 8 Exch. 185, 187, note.

When there is a mutual contract binding one or more persons toward another or several others, the contract is bilateral. When the contract binds one person to another without any engagement being made by the latter, it is unilateral, as in the case of bills and notes, bonds, and the like. Contracts, also, are either principal or accessorial; the first, are those which are entered into by the parties on their own account; the second, are those which are entered into for assuring the performance of another principal contract, such as guarantees or engagements of sureties. Add. on Cont. 2. In its widest sense the term "contract" includes records and specialties, but the term is usually employed to designate simple or parol contracts only. By parol contracts is to be understood, not only verbal and unwritten contracts, but all contracts not of record nor under seal. 1 Story on Cont., § 1; 1 Chit. on Cont. 5.

ARTICLE II.

OF THE DIFFERENT KINDS OF CONTRACTS, AND OF THEIR REQUISITES.

Section 1. Of contracts of record. Contracts of record consist of judgments, recognizances, and statutes staple.

§ 2. **Of sealed contracts or specialties.** Contracts or obligations under seal, or specialties, such as deeds and bonds, are instruments which are not merely in writing, but are also *sealed* by the party to be bound by them, and *delivered* by him to, or for the benefit of the person to whom the liability is thereby incurred. Neither a date, nor, at common law, even the signature of the party is essential to the validity of a deed. 1 Chit. on Cont. 4. But there cannot be a deed without writing, sealing, and delivery. Ib.

§ 3. **Of simple or unsealed contracts.** The term *simple contracts* includes not merely such as are *verbal*, but also such as have been reduced to *writing*, though not sealed and delivered. The law does not recognize a class of contracts, known as contracts in writing, and distinct from verbal and sealed contracts; since both verbal and written contracts are included in the class of simple contracts. In other words, all contracts are distinguished as agreements by specialty, or by agreements by parol, and there is no such third class as contracts in writing. If the contract is merely written, but not under seal, it is a contract by parol, and it has the efficacy, properties, and effect of a parol contract.

The difference, therefore, is not between verbal and written contracts; but between parol or written contracts on the one hand, and specialties or contracts under seal on the other.

Some contracts are required by statute to be reduced to writing, and to be signed or subscribed by the party to be charged thereon, and yet such a requirement relates rather to the mode of evidencing the contract, than to its essential requisites as a valid contract.

The mere fact that a contract is written and signed does not dispense with any of the common-law requisites of a contract. There must still be competent parties, a sufficient consideration, and the due assent of the parties.

§ 4. **Of express or implied contracts.** The intention of the parties to any particular transaction may be gathered from their acts, in connection with the surrounding circumstances, as well as from their words; and the law therefore implies, from

the silent language of men's conduct and actions, contracts and promises as forcible and binding as those that are made by express words, or through the medium of written memorials. Every contract is founded upon the mutual agreement of the parties; and that agreement may either be formally stated in words, or committed to writing, or it may be a legal inference, drawn from the circumstances of the case, in order to explain the situation, conduct, and relation of the parties. When the agreement is formal, and stated either verbally or in writing, it is usually called an *express contract*. When the agreement is matter of inference and deduction, it is called an *implied contract*.

Both species of contract are, however, equally founded upon the actual agreement of the parties, and the only distinction between them is in regard to the mode of proof, which belongs to the law of evidence. In an implied contract, the law only supplies that which, although not stated, must be presumed to have been the agreement intended by the parties.

An implied contract is one which reason and justice dictate, and which the law presumes, therefore, that every man undertakes to perform. And in implied contracts, the law implies from the antecedent acts of persons, what their obligations are to be; whereas, if an express contract is made, the parties themselves thereby define or assume to define them. In implied contracts, however, the law does not vary or introduce new terms into an existing contract or agreement; it merely declares, that particular acts, unaccompanied or unexplained by express stipulations, give rise to particular duties or liabilities; and it then proceeds as though the parties had precisely and expressly stipulated for their performance. *Sceva v. True*, 53 N. H. 627, 632, 633. The idea of contract implied by law is a legal fiction, invented and used for the sake of the remedy, to enforce the performance of a legal duty. *Ib.*

"A great mass of human transactions depends upon implied contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations, which, as honest, fair, and just men, they ought to have made. When the law assumes that they have made these stipulations, it does not vary their contract, or introduce new terms into it, but declares, that certain acts, unexplained by compact, impose certain duties, and that the parties had stipulated for their performance." MARSHALL,

Ch. J. *Ogden v. Saunders*, 13 Wheat. 341. See, also, *United States v. Russell*, 13 Wall. 623, 630.

But, while the law will thus imply a promise in a proper case, it must be remembered that the law will not *imply* a promise when there is an *express* agreement upon the subject, whether such agreement be verbal or in writing. *Harris v. Story*, 2 E. D. Smith, 364; *Lynch v. Onondaga Salt Co.*, 64 Barb. 558; *Vandekarr v. Vandekarr*, 11 Johns. 122; *Walker v. Brown*, 28 Ill. 378; *Creighton v. City of Toledo*, 18 Ohio St. 447. A few illustrations will serve to show the nature of the cases from which the law is said to imply a promise. On the purchase of goods, upon which no price is fixed, the law implies that the buyer will pay a reasonable price for them. Upon a sale of chattels by one who is in possession of them, but who is not the owner, the law implies a warranty of title on the part of the seller. So if a mechanic agrees to do a specified piece of work, the law implies that he will exercise due care, skill and dispatch in its performance. If a surety signs the bond of his principal at his request, there is an implied contract on the part of the principal that he will indemnify the surety, if he is compelled to pay the bond. This subject will be further discussed under the title *Assumpsit*, and other appropriate titles.

§ 5. **Of executed, and of executory contracts.** A contract may be executed or executory. An executed contract is one in which the object or subject-matter of the contract is performed; or in other language, it is a contract in which nothing remains to be done by either party, and where the transaction is completed at the moment that the agreement is made; as where property is sold and delivered, and payment therefor is made on the spot; or where A agrees to exchange horses with B, and they make the exchange immediately.

A contract is executory when some future act or thing is to be done, and while it is unperformed on the part of one or of both of the parties. If A and B agree to exchange horses next week, and it is agreed to postpone the exchange or delivery until that time, the contract is an executory one. So of an agreement to build a house in a year, or to do some other act on or before some future day.

A contract may be executed as to one of the parties, while it is executory as to the other; as, for instance, where one purchases goods which are delivered at the time of the sale, but the time for payment is postponed; or where the wages for specified work are paid before the work is done.

A right of action may be founded upon an executory contract, if the party bound neglects or refuses to perform the agreement, unless there is some legal excuse for such neglect or refusal. So a right of action may be founded upon an executed contract; as, for instance, in the case of a sale or an exchange of property, which is delivered; for if there was a warranty made which has been broken, or a fraud committed, on such sale or exchange, the party injured has a remedy by action.

Although it may appear to be an easy matter to determine whether a given contract is an executed or executory one, it will be found that some very difficult questions have arisen upon this point, especially in relation to contracts of sale, under which title the subject will be fully discussed.

§ 6. **Of entire and divisible contracts.** A contract may be entire, or it may be divisible. An entire contract is one the consideration of which is entire on both sides. A full performance of the contract by either of the parties, in the absence of any agreement to the contrary, or of any waiver thereof, is a condition precedent to a compulsion of the fulfillment of any part of the contract by the other party. The cases in which this rule has been applied and enforced are very numerous. A contract for the sale and delivery of a specified quantity of personal property at an agreed price, and time of payment, requires a full performance by the delivery or tender of the entire quantity to the purchaser. So, an agreement to work for a specified length of time for a fixed compensation, will not be performed so as to entitle the laborer to recover pay for any part of the work until the entire work is done.

In all such cases, in which there is an express contract to deliver a particular quantity of property, or to render specified services, before the payment of the price agreed, there must be a full performance before payment can be required in whole or in part; and the difficulty, or even the impossibility of the performance is, in general, no excuse for the non-performance. To this rule there are some exceptions which will be noticed in their proper place and connection. See "Performance."

In the case of sales it is sometimes difficult to determine whether the contract is entire or several, as may happen where several different articles are sold at one time. The general rule seems to be that upon the sale of different articles for separate prices at the same time, the contract is several as to each article sold, unless the acts of the parties, or the nature of the subject-

matter, renders it necessary to consider the whole sale as an entire transaction.

If the contract is regarded as entire, neither party can rescind it in part and enforce it in part, and, on the other hand, each party is liable for the entire consideration or for no part of it.

An entire contract may be apportioned if the parties consent, whether such assent be express or implied; and, in such case, the excess of consideration advanced may be recovered back. So there may be a waiver as to the performance at the time specified if both parties so agree, or if the party entitled to demand performance consents to waive it. Where the non-performance of a contract is caused by the party who is entitled to claim it, he will be regarded as agreeing to treat the contract as divisible, and the other party may recover for so much of the contract as he has performed.

§ 7. **Of contracts absolute or conditional.** Contracts may be conditional, or may be absolute. An absolute contract is merely an agreement to do or not to do a specified act or thing, in any or all events. A conditional contract is an executory one, and its performance depends upon a condition. It differs from a mere executory contract, since that may be an absolute agreement to do or to omit the doing of some act or thing; while a conditional agreement is one whose very existence and performance depend upon a contingency and a condition.

Conditions may be either precedent or subsequent. A condition precedent is one which must happen before either party becomes bound by the contract. A condition subsequent is one which follows the performance of the contract, and operates to defeat and annul it, upon the subsequent failure of either party to comply with the condition. A condition may be of such a nature that its operation may be either precedent or subsequent. If no time is fixed by the contract for the performance of a condition, the rule is, that it must be performed within a reasonable time. See Non-performance, etc.

§ 8. **Of joint and several contracts.** Contracts may be joint *and* several, or they may be joint *or* several. Where an obligation is undertaken by two or more persons, or a right is given to two or more, the general legal presumption is that it is a joint obligation, or a joint right, as the case may require. Where the subject-matter of the contract is entire, as where the contract is to pay an entire sum to several persons, it is solely a joint contract, and no one of the persons can maintain a separate action

for his share. If, however, the contract be to pay to each person a specific sum, or to perform distinct and separate duties to each, the contract may be considered as several.

In the absence of a written contract, and where the agreement is one of implication from the subject-matter and the circumstances of the case, the nature of the consideration will furnish a good criterion by which to determine whether the contract is joint or several. If the consideration is entire and single, although it moves from several persons jointly, the construction will be joint. While on the other hand, if there are several distinct considerations moving from each of the persons individually, the contract will be several.

ARTICLE III.

OF THE PARTIES TO CONTRACTS.

Section 1. Of contracts made in person. It is a general rule of law that all persons may be parties to a contract, unless they are incompetent by reason of a personal disability, or from considerations of public policy.

In every contract there must, of necessity, be at least two parties: one who is bound to perform the contract, and the other who is entitled to have it performed.

A very large proportion of the contracts which are made, are executed by the parties in person. But, when this is not the case, and the contract is made by an agent, the law still treats it as the act and contract of the principal, who is entitled to the advantages, as well as bound by the liabilities imposed by such contract.

In those cases in which one or both of the parties are not natural persons, but are legal bodies or parties, such as corporations, joint-stock companies, and the like, the act of executing the contract must be that of an officer or agent of the corporation or company; and in this case, as in that of a natural person acting by an agent, it will be the contract of the principal.

§ 2. Of contracts by agents. When a person who is competent to do an act himself, employs another to do it, the employer is called the principal, the person employed is called an agent, and the relation between the parties is termed an agency. Whatever a person may lawfully do in his own right, he may, generally, do by an agent; and, therefore, every person may be a principal, if of full age, if not legally or actually disabled. There are few persons

who are excluded from acting as agents, or from exercising an authority delegated to them by others; and, therefore, it is not necessary for a person to be able to act in his own right in order to enable him to act for others. And any person may be an agent, if he is not actually disabled by weakness of mind, or want of understanding. Legal disability to enter into a contract will not incapacitate a person from becoming or acting as an agent. Thus, for example, infants, married women, persons attainted or outlawed, slaves, or aliens, may be agents for others. The form of executing an agent's authority will be hereafter explained. See Agency.

§ 3. **Of contracts by partners.** In relation to contracts made by a partnership, the general rule is that the act or contract of one partner with reference to, and in the ordinary course and management of the partnership business and affairs, is, in point of law, the act or contract of the whole firm, and binding on them, even though it violates some private arrangement between the partners. The nature of the partnership, and the rights, powers, and duties will be hereafter discussed. See Partnership.

§ 4. **Of contracts by executors and administrators.** It is a general rule that a personal representative is not liable in that character, upon the contract of his testator, except to the extent of the *assets* come to his hands, which are applicable to the payment, in a due course of administration, of the debt sought to be recovered. The cases in which an executor or administrator will become personally liable to pay the testator's debts, and the instances in which their contracts will bind the estate will be further explained elsewhere. See Executors, etc.

§ 5. **Of contracts by trustees.** A trustee is bound to perform all those acts which are necessary for the proper execution of his trust. He must preserve the trust property with the same care as though it were his own. But if it be lost, destroyed, or stolen, he will not be responsible, unless the loss occurs through the want of ordinary care and diligence. He is not, ordinarily, permitted to accept the bounty, nor to purchase the trust property from the *cestui que trust*, although there are exceptions to this general rule, where such sale is open, and made in entire good faith. He ought to keep the funds in his hands safely invested, and he may make such contracts as are necessary to accomplish that purpose. Such funds ought to be secured on real estate, and not upon the personal credit of the debtor. For the general rights and duties of a trustee, see Trustee.

§ 6. Of guardian and ward. The general rules of law that apply to trustees govern the relation of guardian and ward. The guardian is a mere trustee in respect to the management of the ward's property. He may lease, but cannot sell the ward's lands. He cannot apply or employ the property of the ward to his own use or profit. And, generally, it may be said that all his acts relating to his ward's property are acts of agency, for which he is bound to account, and when he has committed waste, or been guilty of willful misconduct, or been wanting in ordinary diligence, he will be responsible for any resulting loss to his ward. See *Guardian and Ward*.

§ 7. Of contracts by or with corporations. A corporation aggregate is regarded in law as a person, and as having all the powers of a natural person in making or enforcing contracts. As a corporation is an artificial or legal person, as distinguished from a natural person, it follows that its acts must be performed by its officers or agents. As the rights, duties, and powers of corporations will be elsewhere treated, it will be sufficient to refer to the title *Corporations*.

§ 8. Of joint-stock companies. The important part which these companies take in the business of the country requires a more extended discussion than can be here given. See *Joint-Stock Companies*.

§ 9. Of contracts by auctioneers. An auctioneer is a person who is authorized to sell goods or merchandise at public auction or sale for a compensation, usually termed a commission. His rights and duties differ from those of a broker in two respects; for, in the first place, he cannot, as auctioneer, buy, either for himself, or for another person, the things he sells as auctioneer; and, in the second place, he cannot sell at private sale. An auctioneer is the agent of the seller of the goods until the sale is effected, and then, for some purposes, he becomes the agent of the buyer, so that in some respects he is treated as the agent of both parties. By knocking down the goods sold to the person who is the highest bidder, and inserting his name in his book or memorandum, as such, he is considered as the agent of both parties; and the memorandum so made by him will bind both parties, as being a memorandum sufficiently signed by an agent of both parties within the statute of frauds. See *Auctioneer; Agency*.

§ 10. Of contracts by brokers. A broker is an agent, employed to make sales, bargains or contracts between other persons, in

trade, commerce, or navigation for compensation in the form of a commission, commonly called brokerage. He is a mere negotiator between the other parties; he does not act in his own name, but in the names of those who employ him, or only as a middleman. In buying or selling goods, he is not intrusted with the custody or possession of them, and is not authorized to buy or sell them in his own name. For further information, see Agency; Broker.

§ 11. **Of contracts by factors.** Factors and brokers are both agents, with this difference, however; the factor is intrusted with the property, which is the subject of the agency; while the broker is merely employed to make a bargain in relation to it. The compensation of a factor is usually a commission, and he is frequently called a commission merchant, or consignee; while the goods received by him for sale are called a consignment. A factor differs from a broker in these respects; a factor may buy and sell in his own name; and he has the goods or merchandise in respect to which his agency is created in his possession, while a broker cannot buy or sell in his own name, and he has no possession of the goods sold.

When a factor undertakes to guarantee to his principal the payment of the purchase-money or price of the goods sold by him, he is, on account of the risk he assumes, entitled to an additional compensation, which is called a *del credere* commission. See further, Factors; Agency.

§ 12. **Of contracts by shipmasters.** A master of a ship has, by the policy of the law-merchant, some authority not usually implied in other cases of a general agency. So long as his agency lasts, the master of a ship has a general authority, growing out of his official relation to the ship, to make all contracts incidental to her ordinary employment. Thus, he may hire seamen for the voyage; he may, in some cases, if the exigencies and necessities of the case require it, borrow money, and pledge the ship for its repayment; he may let the ship on a charter-party, or take shipments on freight if such be her usual employment, but not otherwise; and in some extreme cases he may sell the ship and cargo. See Navigation; Ships and Shipping.

§ 13. **Of the change of parties by novation or substitution.** The term "novation," which is borrowed from the civil law, signifies the substitution, with the agreement of all parties concerned, of one debt for another, or of one party for another. It has also been defined thus: a transaction whereby a debtor is discharged

from his liability to his original creditor, by contracting a new obligation in favor of a new creditor, by the order of his original creditor. Thus, "if A. owes B. \$100, and B. owes C. \$100, and the three meet, and it is agreed between them that A. should pay C. the \$100, B.'s debt is extinguished, and C. may recover that sum against A." *Tatlock v. Harris*, 3 Term R. 180; *Blunt v. Boyd*, 3 Barb. 209; *Karr v. Porter*, 4 Houst. (Del.) 236.

The contract of novation somewhat resembles an executed assignment of a debt, with the consent of the debtor; but to avoid the effect of the legal rule that a chose in action is not assignable so as to give the assignee a right of action in his own name, it is treated as a new contract, of which the consideration is the convenience which results from the substitution of new parties.

To constitute a strict novation according to the civil law, it is necessary that there should be an express assent of all parties, an express promise and acceptance between the new parties, and an entire relinquishment of all claim on, or responsibility to the original creditor. See Assignment.

§ 14. **Of the change of parties by assignment.** Any right under a contract, either express or implied, which has not been reduced to *possession*, is a chose in *action*; and is so called because it can be enforced against an adverse or unwilling party only by an action at law. The old common law prohibited the assignment of choses in action on the ground that by such transfers litigation would be encouraged and suits multiplied. Another reason was, that no debtor should have a new creditor substituted for the original one, without his consent, since he might have substantial reasons for his choice of creditors. Under the old law, if a chose in action was assigned, and an action was brought in a court of law, the action must have been brought in the name of the assignor for the benefit of the assignee, unless the chose in action was a negotiable instrument properly transferred, or the debtor had expressly promised, after the assignment, to pay the debt to the assignee.

In courts of equity the technical common-law rule was disregarded, and where there was a *bona fide* assignment of a chose in action, for a valuable consideration, the assignee was permitted to maintain an action in his own name without any assent or promise upon the part of the debtor. In many of the States the old rules as to parties to actions have been abrogated or modified, so that at the present time it is a rule very generally

observed that an action brought upon any chose in action ought to be prosecuted in the name of the real party in interest. The form, mode and effect of an assignment of property or of choses in action will form the subject of a subsequent chapter. See Assignments.

ARTICLE IV.

OF THE ASSENT OF THE PARTIES TO A CONTRACT.

Section 1. Of the capacity to assent. The law does not regard a contract as valid and binding unless it is founded upon an intelligent understanding of its terms, and a mutual assent of the parties; and, whenever there is such a mental infirmity of either, or of both of the parties, as to render it impossible for them, or either of them, to justly understand or comprehend its terms, or the nature and effect of the assent given, the contract will be invalid and cannot be enforced. No person can properly be said to assent that he will be bound, unless he is endowed with such a degree of reason and judgment as will enable him to comprehend the subject of negotiation; and, hence it is, that the assent which is requisite to give validity to a contract, necessarily presupposes a free, fair, and serious exercise of the reasoning faculty; or, in other words, the power, both physical and moral, of deliberating upon and weighing the consequences of the engagement about to be entered into. If, therefore, either of the parties to an agreement is absolutely deprived of the use of his understanding; or if he is deemed by law not to have attained to it, there can in such a case be no mutual agreement, and, consequently, no contract which will bind him. *Fitzhugh v. Wilcox*, 12 Barb. 255; *Wadsworth v. Sherman*, 14 id. 169; *Matter of Beckwith*, 6 N. Y. S. C. (T. & C.) 13; 3 Hun, 443.

The rule of law, therefore, which requires the assent of the parties to a contract, assumes that such assenting parties shall be *competent* to contract; and, accordingly, in order to there being a valid contract, a *capacity* to contract is absolutely necessary.

But the law *presumes* that all persons possess this capacity to contract; and, where exemption from liability to perform a contract is claimed on account of such want of capacity, this fact must be clearly established by the person who claims the exemption. And, besides this, it is only in particular cases that this kind of protection can be claimed; and, therefore, weakness of mind short of insanity; or immaturity of reason in one who has

attained full age ; or the mere absence of experience or skill upon the subject of the particular contract does not, of itself, afford any ground of relief either at law or in equity.

In some cases the incompetency to contract is general and absolute ; in others it is limited ; in some cases again the contract is void as against both the parties ; in others, only the incompetent or protected party can protect himself from liability upon it.

It will not be necessary to discuss, in this place, the law in relation to the incompetency of particular persons, or as to the validity of contracts made under duress. In the subsequent pages of this work will be found a full discussion of these subjects.

See titles like the following : Lunatics, Insanity, Idiots, Drunkards, Intoxication, Aliens, Infancy, Infants, Coverture, Married Women, Seamen, Bankrupts, Duress.

ARTICLE V.

WHAT CONSTITUTES A VALID ASSENT TO A CONTRACT.

Section 1. Of assent. In general. To constitute a binding contract the legal assent of the parties is absolutely indispensable ; and there are three requisites to such an assent ; it should be mutual ; it should be without restraint ; it should be understandingly made, and without error or mistake. To create a contract it is essential that there should be a reciprocal assent to a certain and definite proposition ; and the parties must assent to the same thing in the same sense. *Suydam v. Clark*, 2 Sandf. 133 ; *Jenness v. Mount Hope Iron Co.*, 53 Me. 20, 23 ; *Hartford & New Haven R. R. Co. v. Jackson*, 24 Conn. 514.

A mere proposal or offer which is not assented to does not constitute a contract, for there must be not only a proposal, but an acceptance of it, before there is a complete contract. *White v. Corlies*, 46 N. Y. (1 Sick.) 467 ; *Stitt v. Huidekopers*, 17 Wall. 384, 396 ; *Washington Ice Co. v. Webster*, 62 Me. 341, 360.

Where a proposition is made which is not accepted, but a modified acceptance is proposed, there is no contract unless the modified proposition is accepted by the party who made the first proposal. *Jenness v. Mount Hope Iron Co.*, 53 Me. 20, 23 ; *Johnson v. Appleby*, L. R., 9 C. P. 158 ; 43 L. J. C. P. 146 ; 22 W. R. 515 ; *Myers v. Smith*, 48 Barb. 614 ; *Hutcheson v. Blakeman*, 3 Metc. (Ky.) 80 ; *Baker v. Johnson Co.*, 37 Iowa, 186 ; *Honeyman v. Marryatt*, 6 H. L. Cas. 112 ; S. C., 21 Beav. 14.

A proposal by one party which is not accepted or assented to by the other, is not binding upon either ; and, at any time before acceptance, it may be retracted. *Stitt v. Huidekopers*, 17 Wall. 384, 396 ; *Chicago & Great Eastern R. R. Co. v. Dane*, 43 N. Y. (4 Hand) 240 ; *Crocker v. New London, Willimantic & Palmer R. R. Co.*, 24 Conn. 261.

The validity of an agreement depends upon the fact that the parties thereto give their free and full assent to all its terms ; and, if there be any misunderstanding as to any material portion of it, there will not be any contract. But, this is to be understood, however, in relation to the fact that the parties know what facts or stipulations they are agreeing to, and not that they fully comprehend the effect or legal liabilities of their engagements.

Where assent to an agreement is procured by fraud, the contract will be void at the election of the party deceived. See *Fraud*, as a defense.

§ 2. Assent how affected by a mistake as to the law. It is a legal presumption that every person knows the law, when he knows the facts ; yet this presumption, though arbitrary, and in most cases untrue in fact, is founded upon principles of public policy ; for without some settled rule which imposes upon every person the duty of well considering and understanding the consequences of his own acts and contracts, there would be no limit to the excuse of ignorance, and no security in any agreement.

Again, the opposite rule would encourage ignorance, and rob knowledge and sagacity of its fair fruits ; for, if a party could claim to set aside his contract on the ground that he was not acquainted with the legal rules governing it, it would be more safe to be ignorant than to be wise. It is a legal presumption, therefore, that every man who makes a contract makes it advisedly, and with a knowledge of its legal incidents and consequences ; and, although this rule, like all arbitrary rules, works injury and injustice in some individual cases, yet it cuts a knot which cannot be untied by the law, and serves to give stability and certainty to the general transactions of commerce, which would otherwise be fluctuating and insecure. Whatever mistakes, therefore, a person may make as to the law relating to his contracts, they will be binding, unless some fraud or imposition has been practiced upon him. *Fellows v. Hermans*, 4 Lans. 230, 243, 244 ; *Lanning v. Carpenter*, 48 N. Y. (3 Sick.) 408, 413 ; *Wheaton v. Wheaton*, 9 Conn. 96 ; *Pinkham v. Gear*, 3 N. H. 163 ; *Hub-*

bard v. Martin, 8 Yerg. 498; *Jones v. Watkins*, 1 Stew. (Ala.) 81; *Jacobs v. Morange*, 47 N. Y. (2 Sick.) 57.

There are cases which maintain a contrary doctrine. *Lawrence v. Beaubien*, 2 Bailey (S. Car.), 623; *Underwood v. Brockman*, 4 Dana (Ky.), 309.

A person is not presumed to know the laws of a foreign country, and ignorance or mistake as to them is treated as a mistake of fact, and not of law. In this respect, the laws of each of the different States of the Union are considered foreign laws. *Haven v. Foster*, 9 Pick. 112, 130; *Norton v. Marden*, 15 Me. 45; *Holmes v. Broughton*, 10 Wend. 75.

§ 3. **Assent how affected by mistake of fact.** Where a contract is made in ignorance of a material fact, or under a plain and injurious mistake in relation to it, such contract is voidable at the election of the person so in error. This rule is not confined to those cases in which there has been a fraudulent concealment or suppression of facts by the opposite party, but extends to cases of innocent misapprehension and mistake. *Roberts v. Fisher*, 43 N. Y. (4 Hand) 159; *Leger v. Bonnaffe*, 2 Barb. 475; 6 N. Y. Leg. Obs. 235.

Every person of reasonable understanding is presumed to know the law, and to act upon the rights which it confers or supports, when he knows all the facts; and, it is culpable negligence in him to do an act, or to make a contract, and then set up his ignorance of law as a defense. But there is no presumption that any person is acquainted with all matters of fact, because it is not possible by any degree of diligence to acquire that knowledge in all cases, and for that reason, an ignorance of facts does not import culpable negligence.

The instances in which contracts may be avoided on the ground of ignorance or mistake as to material facts are very numerous, and in the other portions of this work some of them will be noticed. See Assumpsit; Money Paid; Mistake; Rescission; Reformation, and similar titles.

§ 4. **Of assent obtained by duress.** The assent to every valid contract is such as is given freely and voluntarily; and, therefore, an assent which is procured by compulsion or duress will not create a binding contract.

Duress may be either imprisonment or by threats, and it usually relates to the person whose assent is desired, or nominally obtained.

And, in this country, it has been held that duress of a person's

goods is sufficient to avoid a contract obtained from him in that manner.

This subject is elsewhere fully discussed. See Duress.

§ 5. Of assent given, or contracts made by letters. A proposal for a contract may be made in person, by agent, by telegraph, or by letter; and an assent to it may be given in the same manner.

If the proposition is made by letter, and is sent by mail, the person making the offer may retract by a subsequent letter which reaches the opposite party at any time before an answer of acceptance has been written and put in the mail. But, as soon as such answer is put into the mail, the contract is closed as to both parties. *Wheat v. Cross*, 31 Md. 99; S. C., 1 Am. Rep. 28; *Mactier v. Frith*, 6 Wend. 103; *Vassar v. Camp*, 11 N. Y. (1 Kern.) 441; *Abbott v. Shepard*, 48 N. H. 14; *Hutcheson v. Blake-man*, 3 Metc. (Ky.) 80; *Hamilton v. Lycoming Ins. Co.*, 5 Penn. St. 339; *Potts v. Whitehead*, 5 C. E. Green (N. J.), 55; *Moore v. Pierson*, 6 Iowa, 279.

Although a letter retracting an offer made has been mailed, and is in due course of transmission, at the time when the letter of assent was mailed, the contract will be closed, because the retraction will be of no avail unless received before the acceptance was mailed. *Ib.* *Sanford v. Howard*, 29 Ala. 684.

An acceptance by letter takes effect from the time when it was mailed, and not from the time of its receipt by the other party. *Ib.* *Levy v. Cohen*, 4 Ga. 1; *Vassar v. Camp*, 11 N. Y. (1 Kern.) 441; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Stockham v. Stockham*, 32 Md. 196.

A retraction takes effect when the letter of retraction is received, and not from the time of mailing it. *Ib.*

An offer or proposition made by letter, and not replied to within a reasonable time, is not a contract. *Martin v. Black*, 21 Ala. 721; *Chicago & Great Eastern R. R. Co. v. Dane*, 43 N. Y. (4 Hand.) 240; *Bruner v. Wheaton*, 46 Mo. 363.

Where a letter containing a proposal or an acceptance of one, is properly mailed, neither party will be injuriously affected by the delays of the mail, or by the total miscarriage of the letter. *Vassar v. Camp*, 11 N. Y. (1 Kern.) 441; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390; *Dunlop v. Higgins*, 1 H. L. Cas. 381.

Where a treaty is commenced by letter, and an offer by letter is verbally rejected, the party who made the offer is relieved

from his liability, unless he consents to renew the treaty. *Sheffield Canal Co. v. Sheffield & Rotherham R. R. Co.*, 3 Railw. Cas. 121. Where there have been oral negotiations between two parties, which did not result in a completed contract; and, afterward, one of the parties writes a letter, in which he states his understanding of the terms of the prior negotiations, and accepts the terms thus stated, and requires an acceptance by letter, this does not constitute a contract, but is a mere proposition for a contract. *Hough v. Brown*, 19 N. Y. (5 Smith) 111. See *Washington Ice Co. v. Webster*, 62 Me. 341.

If, by the terms of an offer, a certain time be prescribed, within which it may be accepted by the other party, it must be accepted within that time; and an acceptance after the time will not constitute a contract that will bind the party making the proposal. *Potts v. Whitehead*, 5 C. E. Green (N. J.), 55; *Larmon v. Jordan*, 56 Ill. 204.

So, too, a party making an offer may require that the acceptance shall be made in a particular manner, as, for instance, that it shall be completed by a contract, in writing; and an acceptance in any other manner will not constitute a contract. *Governor, Guardians, etc., of the Poor of Kingston-upon-Hull v. Petch*, 10 Exch. 610; S. C., 28 Eng. Law & Eq. 470.

If a letter is addressed to the owner of lands, inquiring whether he is the owner of certain lots, and, if so, the price of them, and an answer is returned, naming a price, this is not equivalent to a proposal to sell the lots, for, a mere statement of the price is not an offer to sell, since the owner may wish to choose a purchaser and may not be willing to sell to any one who offers his price. *Knight v. Cooley*, 34 Iowa, 218. See, also, *Spencer v. Harding*, L. R., 5 C. P. 561; 19 W. R. 48; 39 L. J. C. P. 332; 23 L. T. (N. S.) 237; *Tucker v. Woods*, 12 Johns. 190.

§ 6. **Of assent given, or contracts made, by telegraph.** The telegraph is now a common medium of communication between parties who desire to enter into contracts. And most, if not all, the rules relating to contracts made by letters, are equally applicable to contracts made by the use of telegrams. Where one party makes an offer, in the first instance, by a telegram, which is accepted by the other party through the same medium, and without any prior agreement or dealing between them, the contract is as complete and as valid as though it had been made by letters through the mails, or even directly by the parties in person. Telegrams used in communicating and accepting an

offer, will, when acted upon, form a contract that will govern the acts of the parties under the stipulations of the telegrams. *Duble v. Batts*, 38 Texas, 312.

A valid contract may be made when the offer is contained in a letter, and the acceptance is made by a telegram. An offer was made by letter, to pay a specified sum as the rent of a particular house for one year, and added, "If you are willing and will telegraph at once to that effect, I will take it," to which the owner replied by telegraph, "you may have the store for one year on the terms of your letter," and this was held to constitute a valid contract. *Prosser v. Henderson*, 20 Upper Canada, Q. B. Rep. 438; Allen's Tel. Cas. 170; see, also, *Calhoun v. Atchison*, 4 Bush (Ky.), 261.

It has been seen that the mailing of a letter containing an assent to the terms of a proposition is sufficient to complete the contract, *ante*, 86. So, where, in pursuance of a previous agreement between the parties to use the telegraph as a means of business communication, a telegram containing a proposition is sent by one of the parties to the other, who accepts it by dispatching a notice that it is accepted, this will be a complete contract from the time when the acceptance was sent. *Trevor v. Wood*, 36 N. Y. (9 Tiff.) 307; 3 Abb. (N. S.) 355; 1 Trans. App. 248.

Parties who use the telegraph as a mode of communication are not responsible for, nor bound by, the errors of the operator in transmitting dispatches. A person who writes a message ordering a specified number of articles is not bound to accept a larger number merely because the operator transmitted a message, which, taken in connection with a previous communication by letter, might be construed as an order for such larger number. *Henkel v. Pape*, L. R., 6 Exch. 7; 23 L. T. (N. S.) 419; 19 W. R. 106; Allen's Tel. Cas. 567.

A wrote to B, asking on what terms he could execute an order for fifty rifles. B answered, stating his terms. Subsequently B received a telegram from A directing him to send "the" rifles. He accordingly forwarded fifty rifles, but A refused to accept more than three of them, for the reason that the message delivered by him to the telegraph operator ordered but *three* rifles, while the operator, by a mistake on his part, telegraphed the word "the" instead of "three," and it was held that A was liable only for three rifles. *Ib.*

A transmitted from Peterhead a telegram to B at Liverpool, as follows: "Send on immediately fifteen twenty tons salt invoice

in my name cash terms." Through the fault of the telegraph clerks the telegraph delivered to B read: "Send on rail immediately fifteen twenty tons salt Morice in morning name cash terms." B sent salt to Peterhead, addressed "Morice, Peterhead," and forwarded the invoices to the same address. The invoices were returned, and A refused to accept a delivery of the salt, and it was held that no contract had been completed between the parties. *Verdin v. Robertson*, 10 Court of Sessions Cases (3d series), 35; Allen's Tel. Cas. 697.

B having entered into a contract with C, the brother of the defendant, for the sale of hay, brought an action against the defendant for not accepting. The judge at the trial admitted letters and telegrams signed by C, as evidence against the defendant, and the jury found for the plaintiff; and it was held that there was sufficient evidence of the authority, and that the two telegrams, of which one was signed in C's name, and in the other the name of the defendant was not mentioned as buyer, together constituted a sufficient memorandum to satisfy the Statute of Frauds, on the ground that the defendant might be treated as the undisclosed principal of C, who appeared on the telegrams to be liable as principal. *McBlain v. Cross*, 25 L. T. (N. S.) 804, Q. B.; Allen's Tel. Cas. 691. See *Trevor v. Wood*, 36 N. Y. (9 Tiff.) 307; 3 Abb. (N. S.) 355; 1 Trans. App. 248; *Godwin v. Francis*, L. R., 5 C. P. 295; 39 L. J. C. P. 121; 22 L. T. (N. S.) 338.

Telegrams signed by a person and relating to a contract, but not stating its terms or conditions, are not sufficient to take the contract out of the Statute of Frauds. *Hazard v. Day*, 14 Allen (Mass.), 487; Allen's Tel. Cas. 319. See *Washington Ice Co. v. Webster*, 62 Me. 341.

Telegrams are competent evidence as a mode or means of proving contracts. *Taylor v. Steamboat Robert Campbell*, 20 Mo. 254; *Beach v. Raritan & Delaware Bay R. R. Co.*, 37 N. Y. (10 Tiff.) 457; 5 Trans. App. 113; *Henkel v. Pape*, L. R., 6 Exch. 7; 23 L. T. (N. S.) 419; 19 W. R. 106; Allen's Tel. Cas. 567; *Durkee v. Vermont Central R. R. Co.*, 29 Vt. 127.

A contract made by telegram must be proved like any other contract, by the best evidence the case admits of, which is the original message, if that is to be found; and if this is lost, its contents may be proved by secondary evidence. *Durkee v. Vermont Central R. R. Co.*, 29 Vt. 127; Allen's Tel. Cas. 59; *Williams v. Brickell*, 37 Miss. 682; Allen's Tel. Cas. 136.

A copy of a telegram is not admissible as evidence, unless it

is impossible to produce the original message. *Matteson v. Moyes*, 25 Ill. 591 ; *Allen's Tel. Cas.* 169.

ARTICLE VI.

OF THE CONSIDERATION OF CONTRACTS.

Section 1. A consideration is necessary. An agreement or promise, made without any consideration to support it, is entirely void and cannot be enforced. In the case of a contract or promise under seal, the law presumes the existence of a sufficient consideration. In the case of simple contracts, which term includes all contracts not under seal, whether oral or written, a sufficient consideration must not only exist in fact, but it must generally be alleged in the pleadings and proved in evidence to warrant a recovery.

Promissory notes and bills of exchange do not ordinarily form any exception to the rule that a consideration is necessary to support them, for, as between the original parties, although there is a presumption that a sufficient consideration exists, so that it is unnecessary for the plaintiff to prove a consideration in the first instance, yet a want, a failure of, or an illegality of consideration may be set up as a defense ; and the only difference between the case of a bill or note and any other contract, as to the immediate parties, is, that the burden of proof is changed. *Parish v. Stone*, 14 Pick. 198, 201 ; *Jennison v. Stafford*, 1 Cush. (Mass.) 168, 169 ; *Sawyer v. Vaughn*, 25 Me. 337, 339 ; *Emery v. Estes*, 31 id. 155.

Although a consideration is indispensably necessary for the support of a simple contract, it is not necessary that it should be expressed in the contract, even though it be a written contract, if it be otherwise duly proved to exist. *Beeson v. Howard*, 44 Ind. 413 ; *Cummings v. Dennett*, 26 Me. 397 ; *Arms v. Ashley*, 4 Pick. 71 ; *Tingley v. Cutler*, 7 Conn. 291 ; *Patchin v. Swift*, 21 Vt. 292 ; *Thompson v. Blanchard*, 3 N. Y. (3 Comst.) 335.

If a written contract does not set forth the specific consideration upon which it is founded, but merely states in general terms that it was made upon a valuable consideration, this is *prima facie* sufficient evidence of that fact. *Whitney v. Stearns*, 16 Me. 394 ; *Sloan v. Gibson*, 4 Mo. 33.

§ 2. Kinds of consideration. "Valuable considerations are divided by the civilians into four species: 1. *Do, ut des:* as

when I give money or goods, on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of repayment; and all sales of goods, in which either there is an expressed contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio, ut facias*: as, when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together; or to do any other positive acts on both sides. Or, it may be to forbear on one side in consideration of something done on the other; as, that in consideration A, the tenant, will repair his house, B, the landlord, will not sue him for waste. Or, it may be for mutual forbearance on both sides; as, that in consideration that A will not trade to Lisbon, B will not trade to Marseilles; so as to avoid interfering with each other. 3. The third species of consideration is *facio, ut des*: when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value to it. And when a servant hires himself to his master for certain wages or an agreed sum of money; here the servant contracts to do his master's service, in order to earn that specified sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform the service for what it shall be reasonably worth. 4. The fourth species is, *do, ut facias*: which is the direct counterpart of the preceding. As when I agree with a servant to give him such wages, upon his performing such work; which, we see, is nothing else but the last species inverted; for *servus facit, ut herus det, and herus dat, and ut servus faciat*." 2 Bla. Com. 444; 3 Broom & Hadley's Com. 158, 159; or vol. 2, 133, top page, Wait's ed.

In the subsequent sections of this article the various kinds of considerations will be considered as fully as is required in a work like the present.

§ 3. **Benefit or injury as a consideration.** A consideration may arise from, or consist of, some benefit or advantage accruing to the party who promises; or, it may arise from some inconvenience or detriment sustained by the person to whom the promise is made; and, whenever any injury to the one party, or any benefit to the other party is the ground of consideration, it will be sufficient to support a contract. *Tompkins v. Philips*, 12 Ga. 52; *Doyle v. Knapp*, 4 Ill. 334; *Warren v. Whitney*, 24 Me. 561; *Ordineal v. Barry*, 24 Miss. 9; *Lawrence v. Fox*, 20 N. Y.

(6 Smith) 268; *Clark v. Sigourney*, 17 Conn. 511; *Carr v. Card*, 34 Mo. 513; *Powell v. Brown*, 3 Johns. 100.

It is not necessary that there should be a concurrence of benefit to one party, and of detriment to the other, to constitute a valid consideration. If the party promising receives a benefit for his promise, that is sufficient, although the other party suffers no detriment. So, if the party promised suffers any detriment, that is sufficient, although the party promising does not receive any benefit. But, if there is no detriment or benefit to either party, there will be no consideration. A few of the numerous cases may be cited in relation to benefit to promisor, or detriment to promisee. The making of a payment upon a promissory note before it is legally demandable, is a sufficient consideration for a promise by the holder to extend the time of payment of the balance of the note. *Newsom v. Finch*, 25 Barb. 175; *Redman v. Deputy*, 26 Ind. 338; *Warner v. Campbell*, 26 Ill. 282; *Fowler v. Brooks*, 13 N. H. 240; *Wright v. Bartlett*, 43 id. 548.

Where the benefit to a party is the prevention of a diminution in the value of his property, this is a sufficient consideration for a contract. *Ordineal v. Parry*, 24 Miss. 9.

Where a borrower of money promises to discharge the lender's debt in consideration of the loan, but without the knowledge of the lender's creditor, this is sufficient to enable the latter to enforce the promise of the borrower. *Lawrence v. Fox*, 20 N. Y. (6 Smith) 268; *Barringer v. Warden*, 12 Cal. 311.

The delivery of property belonging to a debtor, and its acceptance by a third party, for the purpose of paying the debts of the former, is a sufficient consideration for a promise by the latter to pay the claim of the creditor of such debtor. *Smith v. Rogers*, 35 Vt. 140.

A very slight advantage to one party, and a trifling inconvenience to the other, is a sufficient consideration to support a contract, when made by a person of good capacity, who is at the time under the influence of any fraud, imposition, or mistake. *Harlan v. Harlan*, 20 Penn. St. 303; *Oakley v. Boorman*, 21 Wend. 588; *Clark v. Gaylord*, 24 Conn. 484.

It is not necessary that the benefit should be direct or certain, for a contingent, uncertain, or indirect benefit is a sufficient consideration for undertaking a bailment. *Newhall v. Paige*, 10 Gray (Mass.), 366; see *Clark v. Gaylord*, 24 Conn. 484.

The incurring of a legal liability by one person, at the request of another, is a sufficient consideration for a promise of indemnity

made by the latter to the former; as in the case of the indorsement of a promissory note. *Litchfield v. Falconer*, 2 Ala. 280; *L'Amoureux v. Gould*, 7 N. Y. (3 Seld.) 349; *Gardner v. Webber*, 17 Pick. 407.

So of a case in which a person becomes surety for another by signing a bond at his request. *Perkins v. Mayfield*, 5 Port. (Ala.) 182.

An agreement to pay a debt in coin, and the giving of a mortgage to secure its payment will support a promise by the creditor to extend the time of payment. *Kinsey v. Wallace*, 36 Cal. 462.

The assignment of a judgment is a sufficient consideration to support a promise made by the assignee. *Dickerson v. Derrickson*, 39 Ill. 574.

A promise to pay to a constable the amount of an execution placed in his hands for collection, if he will release a levy made under it, is a sufficient consideration for such promise. *West v. Hosea*, 5 Harr. (Del.) 232; *Skellton v. Brewster*, 8 Johns. 376; *Hinman v. Moulton*, 14 id. 466.

Where a sheriff has levied upon goods by virtue of an execution, a delivery of such goods to a receptor is a good consideration to support a promise by the latter to return the goods. *Lockwood v. Bull*, 1 Cow. 322; *Dezell v. Odell*, 3 Hill, 215; *Potter v. Sewall*, 54 Me. 142.

§ 4. Of the adequacy of the consideration. The law has no means of judging of the actual or precise value of a consideration; and, therefore, as a general rule, it does not inquire as to the value of a consideration, provided it be of some value, and be legal in its nature. It is not necessary that the consideration on each side shall be of equal value, nor that a contract or promise shall be supported by a consideration equal in value to the promise or contract of the other party of the contract. If no contracts were valid except such as appeared to be of equal value to each party, very few contracts would be made; and such as were made would be quite likely to be invalid for inequality.

In general, it may be said that neither party expects or believes that the considerations or the promises on each side correspond in value; or that the consideration on the one side, and the promise on the other are of equal value; as is sufficiently evident from the fact that one or both of the parties expects to be the gainer in some manner from the contract.

If there be no legal objection to the validity of a considera-

tion, or, in other words, if it be not illegal, and it is of some value, it will be sufficient to sustain a contract or promise. *Sanborn v. French*, 22 N. H. 246, 248; *Whittle v. Skinner*, 23 Vt. 532; *Oakley v. Boorman*, 21 Wend. 588, 594; *Hubbard v. Coolidge*, 1 Metc. (Mass.) 84; *Clark v. Sigourney*, 17 Conn. 511.

Each party is permitted to use his own judgment as to the value or equality of the consideration; and, where the contract is made in good faith, it is not important how slight the apparent benefit be to the promisor; or how insignificant the damage appears to be to the promisee; in either case the most trifling consideration will be sufficient, if it be not utterly worthless, in fact and in law. "If the contract is fairly made, with a full understanding of all the facts, the '*smallest spark*' of consideration is sufficient." *Sanborn v. French*, 22 N. H. 248.

If a contract is deliberately made, without fraud, and with a full knowledge of all the circumstances, the least consideration will be sufficient. *Train v. Gold*, 5 Pick. 384. "The slightest consideration is sufficient for the greatest undertaking." *Oakley v. Boorman*, 21 Wend. 588, 594; *Johnson v. Titus*, 2 Hill (N. Y.), 606.

A promise to pay a sum of money claimed, if the claimant will make an affidavit of the correctness of the claim, is sufficient and binding if the affidavit be made. *Brooks v. Ball*, 18 Johns. 337. See, also, *Hurd v. Pendrigh*, 2 Hill, 502. So of an agreement to pay such sum as a specified person should say was a reasonable compensation for certain services rendered by the claimant, will be sufficient to enable the latter to recover such sum as may be fixed by the person so named. *Culley v. Hardenburgh*, 1 Denio, 508. So where a claim is made, but is disputed, and the claimant offers to be satisfied if the other party will swear that nothing is due, and the latter makes an affidavit to that effect, this will bar an action upon such claim. *Rourke v. Duffy*, 15 Abb. Pr. 340. So an agreement by a creditor to accept less than the face of his demand, upon receiving security for the amount to be paid, is founded upon a sufficient consideration by reason of the benefit derived from the additional security. *Phillips v. Berger*, 2 Barb. (N. Y.) 608; 8 id. 527; *Little v. Hobbs*, 34 Me. 357; *Boyd v. Hitchcock*, 20 Johns. 76; *Brooks v. White*, 2 Metc. (Mass.) 283.

If the consideration is evidently worthless, it is not sufficient to support a contract. And where a claim is legally groundless, a promise upon a compromise of it and of one cent in addition,

is not enough to support a promise to pay the sum of six hundred dollars. *Schnell v. Nell*, 17 Ind. 29. So if a judgment creditor gives to the judgment debtor a written acknowledgment of the receipt of ten dollars in full discharge of a judgment for ninety dollars, this will not prevent the enforcement of the judgment of the residue. *Bailey v. Day*, 26 Me. 88.

A promise by a father to his son to discharge the latter from a note held by the former, in consideration that the son would not make any more complaints about the father's distribution of his property, is void for want of consideration. *White v. Bluett*, 24 Eng. Law & Eq. 434; 23 L. J. (N. S.) Exch. 86.

A verbal promise to sell goods to a responsible party for their full value and on the usual terms, forms no consideration for an independent engagement to pay the antecedent debt of a third person. *Pfeiffer v. Adler*, 37 N. Y. (10 Tiff.) 164; 4 Trans. App. 95; and see *Belknap v. Bender*, 6 N. Y. S. C. (T. & C.) 611; 4 Hun, 414.

An executory promise to pay a sum of money to be recanted from a bargain which is void by the Statute of Frauds, is not binding because there is no consideration to support it. *Silvernail v. Cole*, 12 Barb. 685. The sale of a chose in action which is absolutely void does not furnish any consideration for a promise. *Sherman v. Barnard*, 19 Barb. 291.

Although mere inadequacy of consideration is not usually a ground for setting aside or holding a contract to be void; yet, where the inadequacy of consideration is evident and gross, it may create a presumption of fraud, mistake, overreaching; or of unconscientious advantage, and thus induce a court of equity to interfere and set aside a contract so entered into. *Hough v. Hunt*, 2 Ohio, 495, 502; *Udall v. Kenney*, 3 Cow. 590; *Hardeman v. Burge*, 10 Yerg. 202; *Wormuck v. Rogers*, 9 Ga. 60; *Judge v. Wilkins*, 19 Ala. 765; *Williams v. Powell*, 1 Ired. Eq. 460. In such cases, however, it is the fraud or undue advantage that furnishes the ground of relief. *Ib.*

§ 5. **Prevention of litigation as a consideration.** The law favors the settlement of disputes and the prevention of litigation; and, therefore, compromises of doubtful and conflicting rights and claims, the settlement of boundaries, and other similar arrangements, are not only good and sufficient considerations for agreements, but are highly favored in the law. *Scott v. Warner*, 2 Lans. 49; *Stewart v. Ahrenfeldt*, 4 Denio, 189; *Farmers' Bank of Amsterdam v. Blair*, 44 Barb. 641, 652. A note which is given

upon the settlement of a doubtful claim preferred against the maker, will be upheld as founded upon a sufficient consideration, without regard to the legal validity of the claim. *Russell v. Cook*, 3 Hill, 504; *Keefe v. Vogel*, 36 Iowa, 87.

The withdrawal of legal proceedings, which were instituted for the purpose of asserting claims to property, and the procuring of releases from the claimants, are a sufficient consideration to support an agreement for a division of such property. *Downer v. Church*, 44 N. Y. (5 Hand) 647. So, the withdrawal of a *caveat* by an heir at law to the proving of the will of his ancestor, is a sufficient consideration to support a promise by the devisees for the payment of a specified sum of money. *Seaman v. Seaman*, 12 Wend. 381. So an agreement by the principal beneficiary under a will, with testator's heirs who threaten to oppose the probate of the will, that if they will sign an admission of the service of the citation and will not contest the proof of the will, he will pay each of them a specified sum, this is a valid consideration; and an acceptance and performance of the terms by the heirs will enable them to maintain an action upon the promise. *Palmer v. North*, 35 Barb. 282; see *Bedell v. Bedell*, 3 Hun, 580; S. C., 6 N. Y. S. C. (T. & C.) 324; *Hill v. Buckminster*, 5 Pick. 393. The compromise of a doubtful and conflicting claim is a good consideration for a new agreement. *Pitkin v. Noyes*, 48 N. H. 294; S. C., 2 Am. Rep. 218, 228.

When there is a dispute as to the title to land, and, for the purpose of compromising it, one of the parties agrees to convey the land to the other with warranty, and the other promises to pay him a sum of money therefor, the agreement will be valid and binding, in the absence of fraud or imposition. *Moore v. Fitzwater*, 2 Rand. (Va.) 442; and see *Mills v. Lee*, 6 T. B. Monr. (Ky.) 91.

In all such cases of compromises, however, there must be a case where there could be some pretense of a claim sustained, though the result of a litigation might be involved in doubt. If the claim made is one which is utterly and palpably untenable, either in fact or in law, no action will lie upon the compromise of such a claim. *Dolcher v. Fry*, 37 Barb. 152; *Silvernail v. Cole*, 12 id. 685; *Cabot v. Haskins*, 3 Pick. 83; *Martin v. Black*, 20 Ala. 309; *Jarvis v. Sutton*, 3 Ind. 289.

§ 6. *Forbearance as a consideration.* An agreement to *forbear* either absolutely, or for a certain time, or for a reasonable time, to institute or prosecute *legal* or *equitable* proceedings to enforce

a legal or equitable demand, is a sufficient consideration for the promise of the debtor, or of a third person, to pay the debt or do any other act. By such forbearance the creditor is delayed, and the debtor is or may be benefited; so that there concur both the ordinary grounds upon which a sufficient consideration may be rested. 1 Obit. Cont. 36; *Watson v. Randall*, 20 Wend. 201; *Mechanics & Farmers' Bank of Albany v. Wixson*, 42 N. Y. (3d Hand) 438; *Hakes v. Hotchkiss*, 23 Vt. 235.

If the claim is a well-founded one, or, even if it be doubtful, a forbearance to prosecute it for a reasonable or a certain time will be a sufficient consideration for a promise. *Haggerty v. Allaire Works*, 5 Sandf. 230; *Ritter v. Phillips*, 53 N. Y. (8 Sick.) 586; *Jennison v. Stafford*, 1 Cush. (Mass.) 168; *Rood v. Jones*, 1 Doug. (Mich.) 188; *Underwood v. Hassack*, 38 Ill. 208; *Templeton v. Bascom*, 33 Vt. 132; *Lowe v. Weatherly*, 4 Dev. & Bat. (N. C.) 212.

A promise by one person to pay the debt of another, in consideration that the creditor will forbear and give further time for the payment of the debt, is a sufficient consideration, although no particular time for forbearance was stipulated for, if the creditor alleges that he did forbear from such a day to such a day, and that was a reasonable time. *King v. Upton*, 4 Me. 387; *Elling v. Vanderlyn*, 4 Johns. 237; *Allen v. Pryor*, 3 A. K. Marsh. (Ky.) 305; *Giles v. Ackles*, 9 Penn. St. 147; *Rood v. Jones*, 1 Doug. (Mich.) 188.

An agreement to delay the collection of an execution is a sufficient consideration for a promise by a stranger to pay the amount of it. *Giles v. Ackles*, 9 Penn. St. 147; *Russell v. Babcock*, 14 Me. 138; see *Read v. French*, 28 N. Y. (1 Tiff.) 285.

The withdrawal of exceptions and the dismissal of a suit constitutes a sufficient consideration for an agreement, even though the exceptions were not well founded. *Burne v. Cummings*, 41 Miss. 192.

An adjournment of the trial of a cause in a justice's court is a sufficient consideration for a promise. *Stewart v. McGuin*, 1 Cow. 99.

Where the claim is one that clearly cannot be maintained at law or in equity, a promise founded upon the forbearance to prosecute such claim will not be enforced because there is no consideration to support it. *Sharpe v. Rogers*, 12 Minn. 174; *Cabot v. Haskins*, 3 Pick. 83; *New Hampshire Bank v. Calcord*, 15 N. H. 119; *Martin v. Black*, 20 Ala. 309; *Merchants' Bank v. Davis*, 3 Ga. 112; *Silvernail v. Cole*, 12 Barb. 685.

Although, as has been stated, *ante*, 97, a promise to forbear for a certain time or for a reasonable time, it has been held that a promise of forbearance for a *short time* is not sufficient, since the party promising might, in such case, sue immediately after the promise was made. *Lonsdale v. Brown*, 4 Wash. C. C. 148; *Sidwell v. Evans*, 1 Penn. 385; *McCorney v. Stanley*, 8 Cush. (Mass.) 85; *Garnett v. Kirkman*, 33 Miss. 389; *Bizler v. Ream*, 3 Penn. 282.

It is not important that the person who makes the promise, in consideration of forbearance, should be benefited by the delay. *Maud v. Waterhouse*, 2 C. & P. 579; *Smith v. Algar*, 1 B. & Ad. 603; *Sage v. Wilcox*, 6 Conn. 81.

The waiver of a legal right, at the request of another person, is a sufficient consideration for a promise made by him. *Sykes v. Laffery*, 27 Ark. 407; *Smith v. Weed*, 20 Wend. 184; *Farmer v. Stewart*, 2 N. H. 97; *Williams v. Alexander*, 4 Ired. Eq. 207; *Waterman v. Barratt*, 4 Harr. (Del.) 311.

§ 7. **Assignment of a debt or a right of action arising upon contract.** The assignment of a debt, or of a right of action founded upon contract, is a valid consideration for a promise by the assignee; and there are very few causes of action arising upon contract which may not be assigned. At common law, however, such an assignment did not ordinarily vest in the assignee a right of action in his own name against the party liable to pay. *Jessel v. Williamsburgh Ins. Co.*, 3 Hill, 88. But an express promise, by the debtor to the assignee, to pay the debt enabled the latter to maintain an action thereon in his own name. *Compton v. Jones*, 4 Cow. 13; *Edson v. Fuller*, 22 N. H. 183; *Page v. Danforth*, 53 Me. 174; *Moar v. Wright*, 1 Vt. 57.

Although, at common law, an action must be brought in the name of the assignor in some cases, the rights of the assignee were, in all proper cases, fully protected by the courts in actions so brought. *Briggs v. Dorr*, 19 Johns. 95; *Timan v. Leland*, 6 Hill, 237.

If the chose in action was a negotiable one, it might be transferred by indorsement, or otherwise, so as to give the holder or owner a right of action in his own name, as in the case of bills of exchange and promissory notes.

In courts of equity the distinction between negotiable and non-negotiable choses in action did not prevail; and the real party in interest might sue in his own name.

The Code of Procedure of New York, § 111, adopts the equitable rule, and authorizes all actions to be brought in the name of the

real party in interest. The rights or causes of action which are thus assignable are very numerous, and include every cause of action arising upon contract, either in the nature of a debt, or of a right to recover damages for the breach of a contract; and, therefore, judgments, bonds, mortgages, bills of exchange, promissory notes, due bills, chattel notes, debts, accounts, contracts and agreements, may, any or all of them, be assigned by one person to another so as to confer a right of action thereon in the name of the assignee. A right of action for the breach of a contract to deliver personal property is assignable, and the assignee may sue in his own name for the damages recoverable. *Sears v. Conover*, 34 Barb. 330; 3 Keyes, 113; 33 How. 324; 4 Abb. Ct. App. 179.

A guaranty for the payment of a note or debt is assignable, and the assignee must sue in his own name. *Small v. Sloan*, 1 Bosw. 352.

The balance due upon an unsettled account is assignable. *Wescott v. Potter*, 40 Vt. 272. And the assignee may sue in his own name. *Allen v. Smith*, 16 N. Y. (2 Smith) 415.

A sheriff may assign his claim to fees for services already rendered, but not for such as are not yet earned. *Birkbeck v. Stafford*, 23 How. Pr. 236; 14 Abb. 285; *Mulhall v. Quinn*, 1 Gray (Mass.), 105. An assignment by a public officer of his salary before it is earned or due, is contrary to public policy, and, therefore, void. *Bliss v. Lawrence*, 58 N. Y. (13 Sick.) 442; 48 How. 21. But see contra, *State Bank v. Hastings*, 15 Wis. 75.

The subject of assignments, their validity, and the rights of assignees will be fully discussed in a subsequent place. See title Assignment.

§ 8. Assignment or sale of property. The sale of property, and the right of the vendor to recover the price, is one of the most familiar cases relating to the consideration for a promise. This whole subject will be illustrated in the titles, Sale; Goods Sold, etc.

§ 9. Services rendered, rewards offered. The performance of labor, or the rendering of personal services, form a very usual ground of consideration for a promise to pay for them; and are legally sufficient if rendered upon a request, express or implied. This subject will be noticed hereafter. See Labor; Service.

The request and the promise contained in a public advertisement, which offers a reward, is a sufficient consideration to sus-

tain an action in favor of any one who complies with the terms and conditions specified.

A sheriff, who publicly offers a reward for the detection and apprehension of a specified criminal, is personally liable to the person who gives the information which leads to the arrest and conviction of such criminal. *Prentiss v. Farnham*, 22 Barb. 519.

So an offer made to pay a reward for the conviction of the perpetrator of a specified crime, although made by one having no interest in the matter, is a sufficient consideration for the promise, if a conviction is secured under such offer. *Furman v. Parke*, 21 N. J. L. (1 Zab.) 310; see, also, *Lee v. Trustees of Flemingsburg*, 7 Dana (Ky.), 28.

If the selectmen of a town, acting under the authority of a general statute, offer a reward for the apprehension and conviction of a person guilty of a crime, an action will lie against the town in favor of one who has performed such service. *Janvrin v. Exeter*, 48 N. H. 83; S. C., 2 Am. Rep. 185; see, also, *Crawshaw v. Roxbury*, 7 Gray (Mass.), 374.

The offer of a reward to a particular person, to a specified class of persons, or to all persons, is a conditional promise; and if either of such persons perform the service required before a revocation of the offer, such performance is a sufficient consideration to render the offer a binding contract. *Freeman v. Boston*, 5 Metc. (Mass.) 56; *Morrell v. Quarles*, 35 Ala. 544; *Ryer v. Stockwell*, 14 Cal. 134; *Smith v. Moore*, 1 C. B. 438; *Thatcher v. England*, 3 id. 254.

Where a reward is offered for the apprehension of a criminal, and the recovery of the moneys feloniously obtained by him, it is essential to a right of action that there should be both an apprehension of the offender and a recovery of the moneys. *Jones v. Phoenix Bank*, 8 N. Y. (4 Seld.) 228.

Where the reward offered merely requires information which will lead to the detection of an offender, it will be sufficient for the claimant to prove that he gave to the offerer of the reward such information as led him to have the suspected person arrested for the offense. *Brennan v. Haff*, 1 Hilt. 151.

An offer of a reward to a public officer to do what it is legally his duty to do without such reward, is contrary to public policy and cannot be enforced. *Hatch v. Mann*, 15 Wend. 44; *Smith v. Whildin*, 10 Penn. St. 39; *Pool v. Boston*, 5 Cush. (Mass.) 219.

This rule, however, does not apply when no such duty is imposed upon the officer, as where a promised reward is claimed

by a police officer of another State for arresting a fugitive to that State. *Morrell v. Quarles*, 35 Ala. 544; see, also, *City Bank v. Bangs*, 2 Edw. Ch. 95; *England v. Davidson*, 11 Ad. & E. 856.

Rewards are also frequently offered for various acts and things, other than the detection, arrest, or conviction of criminals, as in the case of a lost child. *Fallich v. Barber*, 1 Maule & Selw. 108. Or for the recovery of lost goods or personal property: *Howland v. Lownds*, 51 N. Y. (6 Sick.) 604; 10 Am. Rep. 654. Or choses in action, and the like instances.

An offer of a reward is not to be regarded as unlimited in time, and as continuing until it is formally withdrawn, but will be restricted to what is, under the circumstances, a reasonable time. *Loring v. Boston*, 7 Metc. (Mass.) 409.

A person who claims a reward offered for the recovery of lost property, or for information leading to its recovery, must show a performance of the services required, and that this was done after a knowledge of the offer of the reward, and in pursuance of the offer made. *Howland v. Lownds*, 51 N. Y. (6 Sick.) 604; 10 Am. Rep. 654; *Fitch v. Snedaker*, 38 N. Y. (11 Tiff.) 248; 7 Trans. App. 228; but see *The Auditor v. Ballard*, 9 Bush (Ky.), 572; 15 Am. Rep. 728. A person who recovers stolen property, and returns it to the owner, who gives the finder a sum of money which is accepted as payment for his services, cannot recover the amount of a reward offered for such services, where the services were rendered without any knowledge of such offered reward. *Marvin v. Treat*, 37 Conn. 96; 9 Am. Rep. 307.

§ 10. **Trust and confidence as a consideration.** The fact of intrusting a person with property is a consideration, in itself, for his promise that, if he acts upon the trust, he will faithfully discharge it. *McNeilly v. Richardson*, 4 Cow. 607; *Norton v. Kidder*, 54 Me. 189; *Graves v. Ticknor*, 6 N. H. 537; *Clark v. Gaylord*, 24 Conn. 484; *Robinson v. Threadgill*, 13 Ired. 39. As a general rule, no person is bound to accept such a trust, but if he voluntarily does so, he will be required to perform it fairly and fully. If money is collected and placed in the hands of town officers, for the purpose of paying the interest upon bonds issued by the town, pursuant to a statute, and the statute makes it the duty of the officer to apply the money in satisfaction of such interest, a bondholder may maintain an action against such officers to recover the interest due upon bonds held by him. *Murdock v. Aikin*, 29 Barb. 59; *Ross v. Curtiss*, 31 N. Y. (4 Tiff.) 606; 30 Barb. 238. A town collector who had collected a

tax imposed by virtue of a statute, cannot refuse to pay over the money upon the ground of invalidity in the proceedings under which bonds were issued, and upon which the money was to be applied. . . *People v. Brown*, 55 N. Y. (10 Sick.) 180.

§ 11. **Mutual promises as a consideration.** A promise is a good consideration for a promise, whether oral or in writing, unless a written promise is required by some statute, or some rule of law. A large part of the executory contracts made, consists of nothing more than a promise for a promise. For instance, two persons enter into a written contract, in which each of them stipulates with the other that he will do some specified act or thing, by a particular time, and neither of them performs the contract, or any part of it, at the time it is made. Here, it is evident, that the only consideration of the contract is a promise for a promise. And, yet, such a contract is as valid and binding upon the parties as though one of them had paid money or delivered property to the other, in consideration of which the latter promised to do some specified thing. *Coleman v. Eyre*, 45 N. Y. (6 Hand) 38, 41; *Briggs v. Tillotson*, 8 Johns. 304; *Sage v. Hazard*, 6 Barb. 179; *Houghtaling v. Randen*, 25 id. 21; *Appleton v. Chase*, 19 Me. 74; *Quarles v. George*, 23 Pick. 401; *Whitehead v. Potter*, 4 Ired. 257.

If a contract is founded solely upon mutual promises as the consideration, and the promises upon either side are entirely void, there will be no valid contract, because there is no sufficient consideration. See *Illegality*.

It is not indispensably necessary, however, that the promise should in all cases be equally binding in law upon both parties; for, a promise of marriage by an infant is a good consideration for a corresponding promise by an adult, and the latter will be bound by the promise, while the former may avoid the contract. *Hunt v. Peake*, 5 Cow. 475; *Willard v. Stone*, 7 id. 22; *Hamilton v. Lomax*, 26 Barb. 615; 6 Abb. 142; *Cannon v. Alsbury*, 1 A. K. Marsh. (Ky.) 76; *Warwick v. Cooper*, 5 Sneed, 659; *Pool v. Pratt*, 1 D. Chip. 252.

Where the promise of one party is the consideration of the promise of the other, the promises must be concurrent and obligatory on both parties at the same time. *Tucker v. Woods*, 12 Johns. 190; *McKinley v. Watkins*, 13 Ill. 140; *James v. Fulcro*, 5 Texas, 512; *Commercial Bank v. Nolan*, 7 Harr. (Miss.) 508.

There are cases somewhat analogous to a promise for a prom-

ise in which one party may become bound without any corresponding promise by the other party. If A requests B to sell goods to C, and promises to pay for them if such sale is made, here, although B does not promise to sell the goods to C, yet, if he subsequently furnishes them as A requested, the latter will be liable upon his promise. *L'Amoureux v. Gould*, 7 N. Y. (3 Seld.) 349; *Great Northern Railway Co. v. Witham*, L. R., 9 C. P. 16; S. C., 7 Eng. Rep. 130, 134, note; *Willets v. Sun Mutual Ins. Co.*, 45 N. Y. (6 Hand) 45; S. C., 6 Am. Rep. 31; *Train v. Gold*, 5 Pick. 380; *Hilton v. Southwick*, 17 Me. 303; *Des Moines Valley R.R. Co. v. Graff*, 27 Iowa, 99; S. C., 1 Am. Rep. 256.

A request and promise like those just mentioned may be retracted, if done before they have been acted upon. *Routledge v. Grant*, 4 Bing. 653, 660; *Eskridge v. Glover*, 5 Stew. & Port. 264; *Boston & Maine R. R. v. Bartlett*, 3 Cush. (Mass.) 225; *Larmon v. Jordan*, 56 Ill. 204.

An agreement by a judgment creditor to discharge and satisfy his judgment, upon receiving certain property from the judgment debtor, is a sufficient consideration for a promise by the latter to deliver the property. *Givan v. Swadley*, 3 Ind. 484.

§ 12. **Considerations moving from third persons, or strangers.** The cases are contradictory upon the question, whether a person can sue upon a promise, even though it be professedly for his benefit, where he is an entire stranger to the consideration; that is, where he has neither taken any trouble or charge upon himself, nor conferred any benefit on the promisor; but such trouble has been sustained or advantage conferred by a third person. 1 Chit. on Cont. 74. It has been held, that, in cases of simple contract, if one person makes a promise to another for the benefit of a third, it is not binding in favor of the latter, without a promise by him to the plaintiff, except in peculiar circumstances, as where money or property is placed in the hands of the defendant, which in equity and good conscience belongs to the defendant. 1 Story on Cont. 525, § 573; *Exchange Bank of St. Louis v. Rice*, 107 Mass. 37; S. C., 9 Am. Rep. 1; *Tweddle v. Atkinson*, 1 Best & Smith, 393; 8 Jur. (N. S.) 332; 30 L. J. (Q. B.) 265; 9 W. R. 781; 4 L. T. (N. S.) 468; see 1 Chit. on Cont. 75 n. x; 11th Am. ed.

The general current of American authority is, to follow the old English rule, that where one person makes a promise to another, for the benefit of a third, the latter may maintain an action upon such promise, although the consideration does not

move from him. *Bohanan v. Pope*, 42 Me. 93; *Brewer v. Dyer*, 7 Cush. (Mass.) 337; *Crocker v. Higgins*, 7 Conn. 347; *Barker v. Bucklin*, 2 Denio, 45; *Barker v. Bradley*, 42 N. Y. (3 Hand) 316; S.C., 1 Am. Rep. 521; *Barringer v. Warden*, 12 Cal. 311; *Beers v. Robinson*, 9 Penn. St. 229; *Draughan v. Bunting*, 9 Ired. 10; *Brown v. O'Brien*, 1 Rich. 268.

§ 13. **Gratuitous promises; subscriptions and contributions.** An entirely gratuitous promise is void for want of consideration; and though it may be binding in morals or in honor, yet it cannot be enforced by action. A voluntary promise to get a vessel insured, and a neglect to do so, to the injury of the owner of the vessel, does not give any right of action. *Thorne v. Deas*, 4 Johns. 84. So of a mere promise to pay the debt of a friend. *Reading R. R. v. Johnson*, 7 Watts & Serg. 317. Or to pay a part of another's debt in discharge of the whole. *Whelan v. Edwards*, 29 Ga. 315; and see *Richardson v. Williams*, 49 Me. 558. So, where several persons are liable for counsel fees, a promise by one, not a party to the action defended, to pay a share of the expense is not binding. *Flemm v. Whitmore*, 23 Mo. 430.

A promise, which has no inducement except the naked promise of another to do in a few days what he is legally bound to do at once, is void for want of consideration. *Farrington v. Ballard*, 40 Barb. 512. So, of a promise by a purchaser at a sheriff's sale, who afterward promises the debtor's wife that he will secure to her the balance, if any, of the price he shall obtain for the property sold, after reimbursing himself. *Heathman v. Hall*, 3 Ired. Eq. (N. C.) 414. So of a promise to give at the death of the promisor, which is not binding, and conveys no right to the thing promised. *Chevallier v. Wilson*, 1 Texas, 151.

A promise to pay for past services, which were not rendered with the knowledge or at the request of the promisor, express or implied, cannot be enforced. *Bartholomew v. Jackson*, 20 Johns. 28; *Sanderson v. Brown*, 57 Me. 309, 313; *Allen v. Woodward*, 22 N. H. 544.

A gratuitous promise by way of a voluntary subscription for some charitable purpose, such as for alms, education, religion, or other public uses, is quite common; and how far such promises are binding has been a frequent subject of litigation in the courts. In some of the cases it has been held that subscriptions to public works and charities cannot be collected where they are purely gratuitous, and where they have not operated to induce

engagements and liabilities to the knowledge of the subscriber. *Phillips Limerick Academy v. Davis*, 11 Mass. 113; *Hamilton College v. Stewart*, 1 N.Y. (1 Comst.) 581; 2 Denio, 403; *Foxcroft Academy v. Favor*, 4 Greenl. (Me.) 382; *Galt v. Swain*, 9 Gratt. (Va.) 633; *Troy Academy v. Nelson*, 24 Vt. 189; *Curry v. Rogers*, 21 N. H. 247.

Other cases hold that if the subscription book or paper shows a consideration upon its face; or, if it contains a request that any act shall be done, and it is shown that there has been a compliance with such request, this will render the subscription valid. *Barnes v. Perine*, 12 N. Y. (2 Kern.) 18; *Trustees v. Garvey*, 53 Ill. 401; S. C., 5 Am. Rep. 51; *Watkins v. Eames*, 9 Cush. (Mass.) 537; *Caul v. Gibson*, 3 Penn. St. 416; *George v. Harris*, 4 N. H. 535; *Lathrop v. Knapp*, 27 Wis. 214; *Johnston v. Wabash College*, 2 Cart. (Ind.) 555; *Pitt v. Gentle*, 49 Mo. 74; *Macon v. Sheppard*, 2 Humph. (Tenn.) 335; *University of Vermont v. Buell*, 2 Vt. 48.

The request to expend money or do other acts need not be expressed, but may be implied from the nature of the transaction; and where advances are made, or expenses or liabilities are incurred by others in consequence of such subscription, before any notice of withdrawal, this will, on general principles, render the subscriptions binding, where the advances or acts were authorized by a fair and reasonable dependence on the subscriptions. *Ib. Cooper v. McCrimmin*, 33 Texas, 383; S. C., 7 Am. Rep. 268.

Where subscriptions are made under an agreement that they are not to be binding until a specified sum is subscribed, it is essential that all the subscriptions should be absolute; for, if any of the subscriptions necessary to make up the required sum are made upon the condition that the subscribers are not to be called upon for the amount subscribed, it is such a fraud upon the other subscribers as discharges or exonerates them from liability. *New York Exchange Co. v. De Wolf*, 31 N. Y. (4 Tiff.) 273. But, when the full amount is subscribed in good faith by solvent responsible persons, the subscriptions will be binding, although the money has not been paid in. *Westminster College v. Gamble*, 42 Mo. 411. Where a subscription is made upon certain conditions specified by the party subscribing, his subscription will be binding when the acts specified as conditions have been performed. *Williams College v. Danforth*, 12 Pick. 541; *Cooper v. McCrimmin*, 33 Texas, 383; S. C., 7 Am. Rep. 268.

§ 14. **Illegality of consideration.** The general rule is, that if any part of an entire consideration for a promise, or of any part of an entire promise, is illegal, whether at common law, or by statute, the whole contract is void. *Deering v. Chapman*, 22 Me. 488; *Buck v. Albee*, 26 Vt. 184; *Perkins v. Cummings*, 2 Gray (Mass.), 258; *Carlton v. Bailey*, 27 N. H. 230; *Sherman v. Barnard*, 19 Barb. 291; *Filson v. Himes*, 5 Penn. St. 452; *Gamble v. Grimes*, 2 Cart. (Ind.) 392; *Coultter v. Robertson*, 14 Sm. & M. (Miss.) 18; *Brown v. Langford*, 3 Bibb, 500; *Chandler v. Johnson*, 39 Ga. 85; *Kottwitz v. Alexander*, 34 Texas, 689; *Saratoga County Bank v. King*, 44 N. Y. (5 Hand) 87.

But where a contract founded upon two considerations, one of which is merely void, but not illegal, and the other is valid, the contract will be valid and binding, to the extent of the valid consideration, if the contract is, by its terms, susceptible of apportionment. *Hynds v. Hays*, 25 Ind. 31; *Treadwell v. Davis*, 34 Cal. 601; *Chase's Exr. v. Burkholder*, 18 Penn. St. 50.

So where a contract is for the doing of two or more things, which are entirely distinct, and one of them is prohibited by law, while the others are legal, the illegality of the one stipulation will not invalidate the right of action for a breach of the valid stipulations. *Erie Railway Co. v. Union, etc., Express Co.*, 35 N. J. L. 240; *Clements v. Marston*, 52 N. H. 31; *Hanauer v. Gray*, 25 Ark. 350. For a full discussion of this subject, see the title *Illegality*.

§ 15. **Impossible considerations.** The law does not attempt to compel parties to do acts or things which are naturally impossible; and, therefore, a contract which is founded upon an impossible consideration is void and cannot be enforced. A consideration may be impossible either in fact or in law; as where a party promises to walk one thousand miles in an hour; or, where he promises to discharge a party from the obligation due to another person without the concurrence of the latter. *Harvey v. Gibbons*, 2 Lev. 161. But a contract is not void, merely because its performance is difficult or improbable. And, where the difficulty relates to the promisor personally, it is his duty to weigh carefully the difficulty or the improbability of the performance on his part, before he binds himself to perform it. For, if a man agrees to do something which is at the time impossible in fact, though not impossible in its nature, he will be liable in damages for a non-performance of his contract. As where there is a contract to deliver "prime" or "first

class" teas, it is no defense to show that no such teas could be procured at the season of the year when they were to be delivered, because none were to be found in the market. *Gilpins v. Consequa*, 1 Peters' C. C. 86, 91. So, an agreement to transport and deliver goods at a distant place is not excused by the fact that the non-delivery within the agreed time was caused by an unusual freshet, which rendered a public canal impassable so long as to prevent the due performance of the contract. *Harmony v. Bingham*, 12 N. Y. (2 Kern.) 99.

A contract to perfect a patent right in a foreign country for the plaintiff's benefit is binding, although the act could not be done without the aid of an act of parliament. *Beebe v. Johnson*, 19 Wend. 500.

This matter will form the subject of a separate article. See Impossible Contracts, etc.

§ 16. Considerations void in part. "A doctrine which is expressed in the words 'void in part, void in toto,' has often found its way into books and judicial opinions as descriptive of the effect which a statute may have upon deeds or other instruments which have in them some forbidden vice. There is, however, no such general principle of law as the maxim would seem to indicate. On the contrary, the general rule is, that if the good be mixed with the bad it shall nevertheless stand, provided a separation can be made. The exceptions are: First. Where a statute, by its express terms, declares the whole deed or contract void on account of some provision which is unlawful; and, Second. Where there is some all-pervading vice, such as fraud, for example, which is condemned by the common law, and avoids all parts of the transaction because all are alike infected." *Curtis v. Leavitt*, 15 N. Y. (1 Smith) 9, 96, 97.

It sometimes happens that a contract is void in part, and valid in part, and the question is made whether the void part invalidates the entire contract. See *ante*, 106, § 14.

If one or more of the considerations are merely frivolous and insufficient and, therefore, void, but not illegal; and there are other good and sufficient considerations, in such case the considerations may be severed and full effect given to the valid ones, while the insufficient ones are disregarded. *Parish v. Stone*, 14 Pick. 198; *Hynds v. Hays*, 25 Ind. 81; *Treadwell v. Davis*, 34 Cal. 601.

§ 17. Mere moral consideration. Unless there is what the law considers a valuable consideration, it will not be sufficient to sus-

tain an action. A mere moral obligation alone is not sufficient to sustain a promise, unless it is founded upon a previous legal liability. The law does not assume to enforce every promise which a man of nice honor or strict integrity would feel bound to perform. And, therefore, the performance of many purely moral obligations are left to the good faith of the promisor. If one person volunteers, without any previous request, and without any legal obligation, to pay the debt of a third person, such payment does not give any right of action, nor will it be conferred by a subsequent promise. *Ingraham v. Gilbert*, 20 Barb. 151; *Richardson v. Williams*, 49 Me. 558; *Willis v. Hobson*, 37 id. 403; *Williams v. Miller*, 1 Wash. Terr. 105; *Gould v. Village of Phoenix*, 3 N.Y. S. C. (T. & C.) 797; *Eastwood v. Kenyon*, 11 Ad. & E. 438. Where a parent is willing to support his infant child, and a relative, without his request, but with his assent, receives the child into his family and supports it as a child of his own, no agreement on the part of the father can be implied to pay for such support, and a subsequent promise will not support an action. *Chilcott v. Trimble*, 13 Barb. 502.

So the law does not imply a contract to pay for services rendered by an infant who is permitted while out of a place to reside with his uncle, and during such time is provided with food and clothing, and who works in the same way as one of the children of the family. *Defrance v. Austin*, 9 Penn. St. 309; *Weir v. Weir's Admr.*, 3 B. Monr. 645, 647. Where an infant goes from home, against the wishes, but with the father's consent, who paid his traveling expenses, and such infant is taken sick while abroad, the father, who has neither received his earnings, nor paid his expenses, is not liable for the care and attentions bestowed during such sickness. *Johnson v. Gibson*, 4 E. D. Smith, 231; *Davidson v. Davidson*, 12 Iowa, 512.

So where the son was of full age, and was taken suddenly sick among strangers, who relieved him, and the father subsequently promised to pay the expenses incurred, this was held insufficient to sustain an action. *Mills v. Wyman*, 3 Pick. 207. So of a promise by a son to pay for necessities previously furnished to a father. *Cook v. Bradley*, 7 Conn. 57. A promise by a grandfather to pay for services that have been rendered to his grandson is not binding. *Ellicott v. Peterson*, 4 Md. 476, 492. And no action can be maintained upon a note given by a person to an officer of a benevolent society, for his initiation as a member, and for his quarterly dues, for the mere moral obligation, although coupled

with a written express promise, is not sufficient. *Nash v. Russell*, 5 Barb. 556; *Geer v. Archer*, 2 id. 420; *Ehle v. Judson*, 24 Wend. 97.

If there was once a sufficient valuable consideration upon which an action could have been sustained, but, in consequence of some statute, or some positive rule growing out of general principles of public policy, the party so liable is exempted from present liability, the moral obligation will, in such case, support an express promise upon which an action will lie. As familiar illustrations of this rule, a promise will revive a debt barred by the statute of limitations; a debt discharged by a bankrupt or an insolvent law; a promise by an adult to pay a debt contracted during infancy; and many other cases of a similar nature. See Limitations.

§ 18. **Of executed considerations.** Considerations may be of the past, of the present, or of the future. In regard to the time when a consideration operates, it may be *executed*, or something already done before the making of the defendant's promise; it may be *executory*, or something to be done after the promise; it may be concurrent, as in the case of mutual promises; or it may be continuing, as being in one part executed, and one part still continuing or unexecuted. A consideration which is wholly past is called an executed consideration, and it is not sufficient to sustain a promise, unless such past consideration arose at the request, express or implied, of the party who promises; or unless the person to whom such promise is made has been compelled to pay some money, or to do some act in consequence of a liability incurred at the request of the promisor. If a person renders gratuitous services, and a subsequent promise is made to pay for them, this will be a past consideration, and the promise not binding, *ante*, 108.

So of a case in which one person voluntarily, and without previous request, pays the debt of another, and no action lies even upon a subsequent express promise, *ante*, 107, § 17. But where one person becomes a surety for another at his request, and in consequence thereof he is compelled to pay the debt, he may maintain an action against the person for whom he became such surety, and may recover the amount which he was thus compelled to pay. *Ritenour v. Matthews*, 42 Ind. 7; *Wells v. Mann*, 45 N. Y. (6 Hand) 327; S. C., 6 Am. Rep. 93; *Konitsky v. Mayor*, 49 N. Y. (4 Sick.) 571; *Appleton v. Bascom*, 3 Metc.

(Mass.) 169; *Eaton v. Lambert*, 1 Nebr. 339; *Whitworth v. Tilman*, 40 Miss. 76; *Holmes v. Weed*, 19 Barb. 128.

So it has been held that where one man is compelled to pay money which another is bound by law to pay, the law will imply a promise by the latter to reimburse the person making the payment. *Sargeant v. Currier*, 49 N. H. 310; S. C., 6 Am. Rep. 524; *Dressor v. Ainsworth*, 9 Barb. 619; *Hunt v. Amidon*, 4 Hill, 345. In the cases last cited, the purchasers of property were compelled to pay incumbrances which existed at the time of the sale, but unknown to them, and they were allowed to recover the amount from the vendors.

Where an executed consideration is one from which the law will imply a promise, no express promise made in respect of that consideration can be enforced, if it differs from the promise which the law would imply from the same consideration. *Hopkins v. Logan*, 5 M. & W. 241; *Rascorla v. Thomas*, 3 Q. B. 234; *Bailey v. Bussing*, 29 Conn. 1; *Clark v. Small*, 6 Yerg. 418; *Tryon v. Mooney*, 9 Johns. 358; *Bloss v. Kittridge*, 5 Vt. 28; *Hoggins v. Plympton*, 11 Pick. 97; *Proctor v. Keith*, 12 B. Monr. 252; 2 Am. Lead. Cas. 189.

§ 19. **Of executory considerations.** An executory contract relates to some future act to be done by one or both of the parties, but which is yet unperformed. See *ante*, 74, art. 2, § 5.

An executory consideration generally constitutes a condition precedent which must be performed by the plaintiff before a right of action can accrue in his favor; and in his declaration or complaint, he must allege such performance. See *ante*, 102, § 11.

§ 20. **Of concurrent considerations.** A concurrent consideration is said to arise in the case of mutual promises; a promise for a promise, being a good consideration. 1 Chit. on Cont. 73; see *ante*, 102, § 11. In the case of concurrent considerations, the plaintiff's promise is executed, but the thing to be performed by him is executory. And, therefore, though the acts to be done by the plaintiff are not conditions precedent, but concurrent with those to be done by the defendant, yet he cannot maintain an action without showing performance, or an offer on his part to perform. And it is sufficient to allege a readiness and a willingness to perform. *Mount v. Lyon*, 49 N. Y. (4 Sick.) 552; *Coonley v. Anderson*, 1 Hill, 519; *Giles v. Giles*, 9 Q. B. 164.

§ 21. **Of continuing considerations.** A continuing consideration is one which is executed in part, but which continues.

and is in part unexecuted. *Andrews v. Ives*, 3 Conn. 368; *Loomis v. Newhall*, 15 Pick. 159. Where A delivers money to B for the use of C, and B afterward promises C to pay it, this is a continuing consideration, and the promise is binding. *Lilly v. Hays*, 5 Ad. & E. 548; *Weston v. Barker*, 12 Johns. 276.

To sustain an action against the agent there must be an express promise by him to pay over the money as directed. *Bigelow v. Davis*, 16 Barb. 561; *Colvin v. Holbrook*, 2 N. Y. (2 Comst.) 126; *Hall v. Lauderdale*, 46 N. Y. (1 Sick.) 70; *Seaman v. Whitney*, 24 Wend. 260.

§ 22. **Failure of consideration.** Where the consideration of a contract totally fails, and what was supposed to be a sufficient consideration proves to be a nullity and of no value, the contract may be avoided by the immediate parties. *Smith v. McClusky*, 45 Barb. 610; *Treat v. Orono*, 26 Me. 217; *Spring v. Coffin*, 10 Mass. 34; *Sanford v. Dodd*, 2 Day, 437; *Murray v. Carrett*, 3 Call. (Va.) 373; *Charlton v. Lay*, 5 Humph. 496; *Colville v. Besly*, 2 Denio, 139. And where the consideration wholly fails, the party paying or depositing it may recover it back. *Ib.*

In contracts of sale, it is important that the property which is the subject of the contract should be existent, if such was the intention and understanding of the parties, and, therefore, if the sale be of animals, and they are dead; or of property, and it is entirely destroyed, at the time of making the contract, this will render the contract void. *Allen v. Hammond*, 11 Peters, 63; *Rice v. Dwight Manuf. Co.*, 2 Cush. (Mass.) 80, 86; *Kip v. Monroe*, 29 Barb. 579; 18 How. 383; *Couturier v. Hastie*, 5 H. L. Cas. 673. So on a sale of property, where the title totally fails, the contract may be rescinded by the purchaser. *Couturier v. Hastie*, 5 H. L. Cas. 673; *Burt v. Dewey*, 40 N. Y. (1 Hand) 283; *Bordwell v. Collie*, 45 N. Y. (6 Hand) 494; *Ledwich v. McKim*, 53 N. N. (7 Sick.) 807; *Thurston v. Spratt*, 52 Me. 202.

§ 23. **Impeaching consideration.** A party may always show a want or a failure of consideration for the purpose of invalidating a contract, with the single exception of a negotiable promissory note, or bill of exchange, which has passed into the hands of a *bona fide* holder for value, before the bill or note became due, in which latter case the want of consideration would be no defense.

§ 24. **Effect of a seal upon a consideration.** At common law a party was not permitted to show that a sealed instrument was without consideration. In New York, the statute declares that a seal is only presumptive evidence of a sufficient consideration,

which may be rebutted in the same manner, and to the same extent as though it were not sealed. 2 R. S. 406 (423), § 77. Since this statute, a sealed subscription may be impeached for want of consideration. *Wilson v. Baptist Education Society*, 10 Barb. 308. So of a sealed note. *Case v. Boughton*, 11 Wend. 106. The defense must be pleaded. 2 R. S. 406 (423), § 78; *Fay's Administrators v. Richards*, 21 Wend. 626.

ARTICLE VII.

OF THE FORMS OF CONTRACTS.,

Section 1. Of writing contracts. In most countries, and under most systems of jurisprudence, certain forms and solemnities have been established for the purpose of binding men finally and conclusively to the truth and good faith of their acts and representations, and for the due authentication of contracts. Add. on Cont. 41. The most formal and solemn instruments are those in writing and under seal, and their nature will be fully explained under such titles, as Deeds, Mortgages, Bonds, Covenants, and the like. There are also many other forms of written contracts, not under seal, such as ordinary contracts in writing, bills of exchange, checks, promissory notes, and others of a similar nature. But, even where the law requires a contract to be in writing, it may be written in pencil marks, instead of ink. *Geary v. Physic*, 5 B. & C. 234, 237; *Clason v. Baily*, 14 Johns. 484; *Draper v. Pattina*, 2 Speers. (S. C.) 292. And printing is writing within the meaning of the statute. So, too, contracts may be made by means of letters and telegrams, *ante*, 86, 87, art. 5, §§ 5, 6.

§ 2. Statute of frauds. The effect of the statute of frauds upon contracts will be fully discussed elsewhere, and, therefore, a mere reference to that title is all that is required in this place. See Sale; Statute of Frauds.

§ 3. Of the contents of a written contract. Where a contract is reduced to writing it ought to contain the entire terms and conditions agreed upon; for, if the law requires a particular contract to be in writing, and it does not contain all the terms agreed on, the omission cannot be supplied by parol evidence; and, if, on the other hand, the law does not require a writing, but the parties adopt that mode, the terms of the contract ought to be all inserted, as the legal presumption will be, that the writing contains all that was agreed upon between the parties,

and thus raising the question whether parol evidence can be given to establish the matters so omitted.

§ 4. **Of certainty in contracts.** Every contract ought to be so drawn that there is no uncertainty as to what was intended to be agreed upon between the parties. This is important for the purpose of avoiding disputes as to the terms and conditions inserted, and also, to enable the court to give a full and correct construction to the instrument. To constitute a valid oral or written agreement, the parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean. A written agreement which does not show who are the parties to it, is void for uncertainty. *Webster v. Ela*, 5 N. H. 540. So, a contract for a lease, which does not show the length of the proposed term, is insufficient. *Bayley v. Fitzmaurice*, 8 E. & B. 664; 9. H. L. Cas. 78. So, if any agreement be so vague and indefinite, that it is not possible to collect from it the full intention of the parties; for neither court nor a jury can make an agreement for the parties. *Whelan v. Sullivan*, 102 Mass. 204; *King v. Ruckman*, 5 C. E. Green, 316, 359; S. C., 6 id. 599; *Farwell v. Mather*, 10 Allen, 322; *Abeel v. Radcliff*, 13 Johns. 297; *Western Transportation Co. of Buffalo v. Lansing*, 49 N. Y. (4 Sick.) 499, 504, 505.

§ 5. **Signature to contract.** In those cases where some statute requires a written signed contract, there must, of course, be a compliance with such requirements. But, in the absence of any statute, a contract in writing would be incomplete without the signatures of the proper contracting parties. The signature may be written, or may be printed, at the option of the parties. *Saunderson v. Jackson*, 2 B. & P. 238; *Schneider v. Morris*, 2 M. & S. 286; *Lerned v. Wannemacher*, 9 Allen, 416, 417; or stamped on. *Pitts v. Beckett*, 13 M. & W. 743.

If a statute requires a contract to be *subscribed*, a printed signature will not be sufficient. *Viekie v. Osgood*, 8 Barb. 130.

As to signatures by telegrams, see *ante*, 87, art. 5, § 6.

§ 6. **Attestation of contracts.** In those cases where an attesting witness is required by law, it will be important to have the instrument properly attested or witnessed. And, where such witnesses are required, it is also necessary to call on them to prove the execution of the instrument. *Hollenbeck v. Fleming*, 6 Hill, 303; *Story v. Lovett*, 1 E. D. Smith, 153; *Jones v. Underwood*, 23 Barb. 481; *Hodnett v. Smith*, 41 How. 190; 10 Abb. (N. S.) 86. Although parties may be competent as witnesses in an action, this does

not dispense with the production of the attesting witness when this is practicable. *Ib.*

§ 7. **Recording contracts, etc.** In this country the recording of deeds, mortgages, and other instruments and contracts is so universal that it is not usually overlooked or neglected. The mode and effect of recording the various instruments requiring it, will be noticed in their appropriate places, under the titles discussed. See *Deeds; Mortgages; Chattel Mortgages, etc.* See 1 *Broom & Had. Com.* 769, *Wait's ed.*, note 381.

ARTICLE VIII.

OF THE CONSTRUCTION OF CONTRACTS.

Section 1. In general. All contracts derive their force from the mutual assent of the parties to the terms and conditions specified therein; and, therefore, it is not only necessary to interpret those terms for the purpose of ascertaining the intention of the parties in entering into the agreement, but also so to construe them as to give legal effect and operation to such intention. The importance of a reasonable and just construction of every instrument or contract is quite evident and certain. So, too, it is equally important that the rules of construction should be regulated by law, and be governed by distinct, settled, principles, so that there may be uniformity and certainty in their application. When any one particular contract is properly construed, justice will be done to the parties directly interested in it. But, it is essential that all other contracts should be construed by general rules which are uniform, consistent and just. In this way all parties may secure justice for themselves; for they will then know beforehand the force and effect of the words or terms they may use, and can then enter into contracts, or refuse to do so, or make or accept instruments, as they may judge it to be for their interest. To secure consistency and uniformity in the application of rules of construction, it is necessary that these rules should be regarded as principles of law, and that their construction and application should be confided to the courts, to be dealt with as a matter of law, and not as a question of fact.

§ 2. **Construction of contracts is for the court.** As has just been stated it is proper that the construction of contracts should be left to the courts; and such is also the rule of law, as it is

well settled that the construction of all contracts is for the court, whether the contract be sealed or unsealed, written or oral.

That such is the rule as to written instruments or contracts, see *Nash v. Drisco*, 51 Me. 417; *Mondnoch R. R. v. Felt*, 52 N. H. 379; *Wason v. Rowe*, 16 Vt. 525; *Smith v. Faulkner*, 12 Gray, 251; *McAvoy v. Long*, 13 Ill. 147; *Collins v. Banbury*, 5 Ired. 118; *Emery v. Owings*, 6 Gill. 191; *Williams v. Waters*, 36 Ga. 454; *State v. Lefavre*, 53 Mo. 470.

If the contract be oral, and there is a dispute as to its terms, that question is one of fact, to be tried by a jury, or by the court. *Guptill v. Damon*, 42 Me. 271; *Globe Works v. Wright*, 106 Mass. 216; *Illinois, etc. v. Cassell*, 17 Ill. 389; *Chapin v. Potter*, 1 Hilt. 366; *Bradbury v. Marbury*, 12 Ala. 520.

But, after the terms of the contract are thus settled, or, if they are agreed upon by the parties, the construction is then for the court. *Ib.* *Pratt v. Langdon*, 12 Allen, 544; *Fosterman v. Parker*, 10 Ired. 477; *Rhodes v. Chesson*, Busbee's Law, 336. See 1 Broom & Had. Com. 725, Wait's ed., note 354.

§ 3. Construction when for a jury. When the contract is oral, and there is a dispute as to the terms, it is a question of fact to be settled by a jury what the agreement really was. See the cases cited in the last section, and *Moore v. Garwood*, 4 Exch. 681, 690; *Berwick v. Horsfall*, 4 C. B. (N. S.) 450; *Edwards v. Goldsmith*, 16 Penn. St. 43; *Guptill v. Damon*, 42 Me. 271; *Illinois, etc., v. Cassell*, 17 Ill. 389.

The mere loss of a document, so that parol evidence is admissible to prove its contents, does not make the construction of its contents a question for a jury. *Berwick v. Horsfall*, 4 C. B. (N. S.) 450; see the cases cited in the last section. But it has been held that where the contents of a written contract which is lost is proved by parol, without any copy, its construction must be determined by the jury. *Moore v. Holland*, 39 Me. 307.

The rule that the construction of a contract is for the court has an apparent exception in the case of unusual, technical or official words, when used in a contract. If the meaning is to be obtained from experts, or from persons acquainted with the particular art to which these words refer, or from authoritative definitions, the evidence on this point may be conflicting, and then a question is presented for a jury. *Eaton v. Smith*, 20 Pick. 150; *Brown v. Orland*, 36 Me. 376; *Burnham v. Allen*, 1 Gray, 496; *Taliaferro v. Cundiff*, 33 Texas, 415. So where the evidence of a contract consists in part of written evidence, and

in part of oral communications, or other unwritten evidence, it is left to the jury to determine upon the whole evidence what the contract is. *Edwards v. Goldsmith*, 16 Penn. St. 43; *Bom eisler v. Dobson*, 5 Whart. 398; *Morrell v. Frith*, 3 M. & W. 404; *Globe Works v. Wright*, 106 Mass. 216; *Moore v. Garswood*, 4 Exch. 681, 690; *Shore v. Wilson*, 9 Cl. & Fin. 510.

§ 4. The construction is the same at law or in equity. The general rules or maxims which control the interpretation or construction of contracts are the same at law or in equity. *Doe v. Laming*, 2 Burr. 1108; *Eaton v. Lyon*, 3 Ves. 692; *Ball v. Storie*, 1 Sim. & Stu. 210.

And there is no difference in the rule, whether the contract be sealed or unsealed. *Seddon v. Senate*, 13 East, 74; *Hewett v. Painter*, 1 Bulsb. 174, 175; *Robertson v. French*, 4 East, 130; *Kane v. Hood*, 13 Pick. 281.

§ 5. The intention of the parties controls. The object of construction is to ascertain what the parties intended by the terms and expressions used in a contract, and the courts will, so far as the rules of law will permit, give effect to that intention. In interpreting a contract the courts will endeavor to avoid any construction which does violence to the rules of language, or to the rules of law. And, while an effort will be made to construe a contract as the parties understood it, and intended to agree, yet the construction and the effect given to a contract must be in harmony with the law and the general principles of the language. The words used must not be perverted from their proper signification to one entirely different, although it may be evident that the words used, either through ignorance or inadvertence, express a meaning very different from that intended by the parties. Thus, where a contract relates to "horses," the courts will not construe it to relate to "oxen," even though it might be shown by parol evidence that such was the real intention. How far parol evidence is admissible in such cases will be discussed in § 23, *post*.

Generally, when the intent can be distinctly and clearly ascertained from the language used, it will prevail, not only in cases in which it is not fully and clearly expressed, but even where it contradicts particular terms of the agreement. The object of the law, in adopting rules of construction, is to ascertain the meaning of the parties, and not to declare or impose terms or meanings upon them, and, therefore, the language or expressions made use of by them will be subservient to the evident intention. Where the terms of a promise admit of more senses than one, the prom-

ise is to be performed in that sense which the promisor knew or believed at the time the promisee received it. *Barlow v. Scott*, 24 N. Y. (10 Smith) 40; *Gunnison v. Bancroft*, 11 Vt. 493.

Temures promised the garrison of Sebastia that if they would surrender, no blood should be shed. The garrison surrendered,—and Temures buried them all alive. Now Temures fulfilled the promise in one sense; and, in the sense, too, in which he intended it at the time; but not in the sense in which the garrison of Sebastia actually received it, nor in the sense in which Temures himself knew that the garrison received it; which last sense was the one in which he was, in conscience, bound to have performed it. In construing a contract, the courts ought to consider the acts to be done under it, and the manner of performing them, and then such a construction should be adopted as will give effect to the provisions which carry out the evident intent of the contract; and to effect this, the entire contract should be considered in determining the meaning of any of its parts. *People v. Gosper*, 3 Nebr. 285. Courts, in the construction of contracts, look to the language employed, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words, and of the correct application of the language to the things described. *Nash v. Towne*, 5 Wall. (U. S.) 689, 699; *Ricker v. Fairbanks*, 40 Me. 43. If the intent can be clearly and distinctly ascertained from the language used, it will prevail, not merely in those cases where it is not fully and clearly expressed, but even where it contradicts particular terms of the agreement. *Cooke v. Barr*, 39 Conn. 296. Where the terms used are such as to include other words which denote the same thing, then such a construction may be adopted as will carry into effect the intention of the parties. Thus, the term “men” will be held to mean “mankind,” and to include “women;” and the word “horse” may be construed to mean “mares.” *State v. Dunnivant*, 3 Brev. (S. C.) 9; see *Pennsylvania Coal Co. v. Delaware & Hudson Canal Co.*, 29 Barb. 589; *Packard v. Hill*, 7 Cow. 434; 5 Wend. 375. A construction that will give an unlimited and customary signification to every part of a contract is to be preferred. *Rolker v. Great Western Insurance Co.*, 3 Keyes, 17; 4 Abb. Ct. App. 76.

So contracts are to be construed according to the general intent which appears from the language used in them. *Morey v. Haman*, 10 Vt. 567; *Gray v. Clark*, 11 id. 588; *Hunter v. Miller*, 6 B. Monr. 612.

Where the language of a contract is such that no doubt or uncertainty exists as to the meaning of the terms used, parol evidence is not admissible to show that a different meaning was intended. *Curtiss v. Howell*, 39 N. Y. (12 Tiff.) 211; *Kimball v. Brawner*, 47 Mo. 398; *Warren v. Jones*, 51 Me. 146. And if the language is plain and unequivocal, there is no room for construction, and even though a party may have misapprehended it, or it may not express his real intent, still it must be carried into effect according to its plain meaning. *Strohicker v. Farmers' Bank*, 6 Penn. St. 41; *Benjamin v. McConnell*, 4 Gilm. 536; *Secombe v. Edwards*, 28 Beav. 440; *Railroad Company v. Trimble*, 10 Wall. (U. S.) 367; *Callender v. Dinsmore*, 55 N. Y. (10 Sick.) 200; *Huntington v. Dinsmore*, 6 N. Y. S. C. (T. & C.) 195; 4 Hun, 66.

If mutual contracts are not fully and definitely expressed, the law requires that such a construction shall be put upon them as will secure equal and exact justice. *Whites v. Polk*, 36 Texas, 502.

§ 6. **Situation of parties, and evidence of surrounding circumstances.** To enable us to arrive at the real intention of the parties, and to make a correct application of the words and language of the contract, to the subject-matter, and to the objects professed to be described, all the surrounding facts and circumstances may be taken into consideration. The law does not deny to the reader the same light and information that the writer enjoyed; he may acquaint himself with the persons and circumstances that are the subjects of the allusions and statements in the writing, and is entitled to place himself in the same situation as the party who made the contract, to view the circumstances as he viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. *Share v. Wilson*, 9 Cl. & Fin. 555, 569; *Macdonald v. Longbottom*, 1 El. & Bla. 987; *Mumford v. Getting*, 7 C. B. (N. S.) 305; *Carr v. Montefiore*, 5 Best & Smith, 408; *Hurley v. Brown*, 98 Mass. 545; *Karmuller v. Krotz*, 18 Iowa, 352; *Rose v. Roberts*, 9 Minn. 119; *McCleary v. Edwards*, 27 Barb. 239; *Dent v. North American Steamship Co.*, 49 N. Y. (4 Sick.) 390; *Field v. Schricher*, 14 Iowa, 119.

§ 7. **Construction to be reasonable.** Every agreement or contract ought to receive a reasonable construction; and, if it is omissive in some particular, or if the terms are not in entire harmony, the true intent of the parties is to be carried into effect when practicable. If a clause in a contract is susceptible of two different constructions, that one is to be preferred which will give it some operation, rather than that which will have none. *Archibald v. Thomas*, 3 Cow. 284; *Peckham v. Haddock*, 36 Ill. 38; *Riley v. Vanhouton*, 5 Miss. (4 How.) 428; *Evans v. Sanders*, 8 Port. (Ala.) 497; *Higgins v. Wasgatt*, 34 Me. 305. An agreement to pay interest will be construed to mean legal interest. *Archibald v. Thomas*, 3 Cow. 284.

If no time is specified for the performance of a contract, the law will require that it shall be performed within a reasonable time. *Little v. Hobbs*, 34 Me. 357; *Warren v. Wheeler*, 8 Metc. (Mass.) 97; *Adams v. Adams*, 26 Ala. 272; *Luckhart v. Ogden*, 30 Cal. 547; *Wright v. Maxwell*, 9 Ind. 192; *Waterman v. Dutton*, 6 Wis. 265.

Where a note is payable in specific articles without mentioning any day or place of payment, it will be construed to be payable on demand, and an actual demand will be necessary before suit brought. *Lobdell v. Hopkins*, 5 Cow. 516; *Rice v. Churchill*, 2 Denio, 145; *Durkee v. Marshall*, 7 Wend. 312; *Cook v. Ferral's Admrs.*, 13 id. 285.

Where a chattel note is payable in portable articles, on or before a specified day, but no place of payment is specified, the residence of the creditor is the place of payment. *La Farge v. Rickert*, 5 Wend. 187; *Goodwin v. Holbrook*, 4 id. 377; *Wilmouth v. Patten*, 2 Bibb (Ky.), 280. When such note is made by a mechanic, manufacturer, merchant or producer, and the note does not specify any place of payment, the general rule is, that the note is payable at the shop of the mechanic, the manufactory or warehouse of the manufacturer, the store of the merchant, or the farm of the producer. *Lobdell v. Hopkins*, 5 Cow. 516; *Rice v. Churchill*, 2 Denio, 145.

A contract to do work implies that the workman possesses, and that he will use reasonable skill in performing the work. *McDonald v. Simpson*, 4 Ark. 523; *Dastor v. Brown*, 25 Ga. 24; *Smith v. Nelson*, 33 Iowa, 24. The foregoing are but a few of the numerous instances in which a reasonable construction of a contract will imply duties, require skill and care, and supply evident omissions.

§ 8. **Construction to be liberal.** The interpretation and the construction of a contract ought to be liberal; and the words should be taken in their common and most comprehensive sense, unless there is something to show that they were meant to be used in a sense more limited or confined. *Whitehouse v. Liverpool Gas Co.*, 5 C. B. 798; *Mallan v. May*, 13 M. & W. 511, 517; *Davis v. Barney*, 2 Gill. & J. 382; *State v. Dunnivant*, 3 Brev. (S. C.) 9.

In construing contracts, courts will endeavor to avoid what is unequal, unreasonable and improbable, if this can be done consistently with the terms of the contract. *Royalton v. Royalton & Woodstock Turnpike Co.*, 14 Vt. 311.

The construction of commercial contracts is especially liberal. *Bell v. Bruen*, 1 How. (U. S.) 169; *Lawrence v. McCalmont*, 2 id. 426. A contract by a manufacturer, to make and finish certain specified goods "as soon as possible," means within a *reasonable* time, due regard being had to the manufacturer's means, his engagements, and the nature of the articles. *Attwood v. Emery*, 1 C. B. (N. S.) 110. A promissory note, payable four months after date, or as soon as the maker shall collect a specified debt from B, is a promise to pay at the end of four months at all events, and sooner if such debt shall be sooner collected. *McCarty v. Howell*, 24 Ill. 341. A written promise to pay as soon as collected at A, etc., is an absolute promise to pay upon the expiration of a reasonable time for collecting the sum named. *Ubsdell v. Pierson*, 22 Mo. 124. A contract by a planter to deliver cotton raised by him, as soon as it could be picked out and shipped, does not mean in the shortest possible time in which, by any means, or upon any terms, it could be done, but that he may employ the usual mode of transportation. *Waddell v. Reddick*, 2 Ired. L. (N. C.) 424. See *Streeter v. Streeter*, 43 Ill. 155; *Johnson v. Chambers*, 12 Ind. 102. If an act is to be done on demand, it must be done within a reasonable time after the demand. *Blackwell v. Fosters*, 1 Metc. (Ky.) 88.

§ 9. **Construction to be favorable.** The construction of a contract ought to be favorable, so that it may be maintained rather than defeated. *Thrall v. Newell*, 19 Vt. 202; *Brown v. Slater*, 16 Conn. 192; *Brewer v. Hardy*, 22 Pick. 376; *Rogers v. Eagle Fire Co.*, 9 Wend. 611; *Adams v. Adams*, 26 Ala. 272.

A clause in a contract, which is susceptible of two constructions, will be taken in that sense which will give it some operation,

instead of one that will give no effect. *Archibald v. Thomas*, 3 Cow. 284; *Hunter v. Anthony*, 8 Jones' L. (N. C.) 385; *Peckham v. Haddock*, 36 Ill. 38; *Lynch v. Livingston*, 8 Barb. 463; 6 N. Y. (2 Seld.) 422; *Evans v. Sanders*, 8 Port. (Ala.) 497.

If one construction of a contract will render it illegal, and another will make it valid, the latter will be preferred. *Merrill v. Melchoir*, 30 Miss. 516; *Chittenden v. French*, 21 Ill. 598; *Archibald v. Thomas*, 3 Cow. 284; *Thrall v. Newell*, 19 Vt. 202; *Riley v. Vanhouten*, 4 How. (Miss.) 428; *Olcott v. Tioga R. R. Co.*, 27 N. Y. (13 Smith) 546; *Patrick v. Grant*, 14 Me. 238.

A party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with property, should have a construction given to the instrument favorable to himself. *Noonan v. Bradley*, 9 Wall. (U. S.) 394.

§ 10. Words construed according to their popular sense. The construction to be given to a contract is that which is the plain, clear, and obvious result of the terms used in it; and these terms are to be understood in their plain, ordinary, and popular sense. *Hawes v. Smith*, 12 Me. 429; *Mansfield, etc., R. R. Co. v. Veeder*, 17 Ohio, 385; *McWilliams v. Martin*, 12 Serg. & R. 260; *Louber v. LeRoy*, 2 Sandf. (N. Y.) 202; *Goosey v. Goosey*, 48 Miss. 210.

If words have acquired a particular meaning, distinct from the popular sense of the same words, they may, in some cases, be understood in the particular sense, if that is necessary to give effect to the intention of the parties. *Ib. Findley v. Findley*, 11 Gratt. (Va.) 434.

In construing words, the general rule is, to prefer the comprehension to the restricted, the general to the particular, and the common to the unusual sense.

§ 11. Technical words, how construed. Where a contract relates or refers to principles of science, or art, or use, the technical phraseology of some profession, occupation, or common words in a technical sense, or the words of a foreign language, their true and precise meaning may be shown by the evidence of experts, or persons who possess competent knowledge and skill for that purpose. *Share v. Wilson*, 9 Clark & Fin. 511; *Cabarga v. Seeger*, 17 Penn. St. 514; *Sheldon v. Babcock*, 4 Hill, 129; *Dana v. Fiedler*, 12 N. Y. (2 Kern.) 40.

If the evidence of the experts is conflicting, or uncertain, the meaning of the words will be for the jury, but their construction for the court, *ante*, 114, § 2. "The rule is that words, or forms of expression which are not of universal use, but are purely local

or technical, may be explained by parol evidence, and the same is true of words or phrases having two meanings, one common and universal, and the other peculiar, technical or local. In such case parol evidence may be given of facts tending to show in which sense the words were used. Where characters, marks or technical terms are used in a particular business, unintelligible to persons unacquainted with such business, and occur in a written instrument, their meaning may be explained by parol evidence, if the explanation is consistent with the terms of the contract." *Callender v. Dinsmore*, 55 N. Y. (10 Sick.) 200, 205, 206; *Barnard v. Kellogg*, 10 Wall. 383.

In mercantile contracts the words used may, by usage, bear a meaning very different from their natural one; and such meaning may be made matter of evidence; and it is for this reason that mercantile contracts are to be construed according to the usage and custom of merchants; and when such contracts contain peculiar expressions which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what the meaning of these expressions is, although it is for the court to decide what is the meaning of the contract. 1 Chit. on Cont. 116; *ante*, 114, 115, §§ 2, 3; *Eaton v. Smith*, 20 Pick. 150; *Smith v. Faulkner*, 12 Gray, 255, 256; *Robinson v. Fiske*, 25 Me. 405; *Wayne v. Steamboat General Pike*, 16 Ohio, 421; *Brooks v. Cotton*, 48 N. H. 50; S. C., 2 Am. Rep. 172.

Technical rules of construction are not to be resorted to where the meaning of the parties is obvious. *Noyes v. Nichols*, 28 Vt. 159.

§ 12. **The construction is to be upon the whole contract.** In construing a contract, much light will be thrown upon the subject when the object and intent of the parties have been ascertained.

The parties make the contract, and it may be assumed that they had the same purpose and object in view in the whole of it; and, if this purpose is more clear and certain in some parts than in others, those which are obscure may be illustrated and explained by the light of the other terms. And this is the reason for the rule, that the exposition or construction of a contract is to be upon the entire contract, in all its parts and terms, and not upon separate and disjointed portions of it. *Washburn v. Gould*, 3 Story, 122, 162; *Chase v. Bradley*, 26 Me. 531; *Gray v. Clark*, 11 Vt. 583; *Warren v. Merrifield*, 8 Metc. (Mass.) 96; *McNairy v. Thompson*, 1 Sneed, 141; *Kelly v. Mills*, 8 Ohio, 325; *Springsteen v. Samson*, 32 N. Y. (5 Tiff.) 703; *Barnum v. Thurston*,

17 Md. 470; *Rose v. Roberts*, 9 Minn. 119; *Stewart v. Lang*, 37 Penn. St. 201; *Swisher v. Grumbles*, 18 Texas, 164.

If a contract is made up of several instruments executed at the same time and relating to the same matter, they are to be construed together as forming parts of one contract. *Salmon Falls Manuf. Co. v. Portsmouth Co.*, 46 N. H. 249; *Stacey v. Randall*, 17 Ill. 467; *Rogers v. Smith*, 47 N. Y. (2 Sick.) 324; *Cordray v. Mordecai*, 2 Rich. (S. C.) 518; *Wallis v. Beauchamp*, 15 Texas, 303; *Strong v. Barnes*, 11 Vt. 221; *Sewall v. Henry*, 9 Ala. 24.

The rule is the same where such instruments are executed at different times. *ib. VanHagan v. Van Rensselaer*, 18 Johns. 420; *Adams v. Hill*, 16 Me. 215; *Logan v. Tibbott*, 4 Green (Iowa), 389.

The court will read several papers in such order of time and priority as will carry into effect the intention of the parties. *Newhall v. Wright*, 3 Mass. 128; *Whitehurst v. Boyd*, 8 Ala. 375.

From the mere fact that two instruments were executed by the same parties, on the same day, it does not necessarily follow that they were both executed at the same time, and were a part of the same transaction. *Mann v. Wilbeck*, 17 Barb. 388. And though several instruments are executed at the same time, they ought not to be construed together unless they are between the same parties. *Craig v. Wells*, 11 N. Y. (1 Kern.) 315.

In ascertaining the object of the contract, and the intention of the parties, not only will the entire contract be considered, but one clause in the contract may be used for the interpretation of another. *Morey v. Homan*, 10 Vt. 565; *Chase v. Bradley*, 26 Me. 531; *Heywood v. Perrin*, 10 Pick. 230; *Cobbs v. Fountain*, 3 Rand. (Va.) 487; *Williamson v. McClure*, 37 Penn. St. 402; *Tracy v. Chicago*, 24 Ill. 500.

§ 13. **Inconsistent clauses.** It has been held, that, as a general rule, where the clauses of an instrument are repugnant and incompatible, the earlier one prevails in deeds and other instruments between living persons, where the inconsistency is not so great as to render the instrument void for uncertainty. *Mott v. Richtmyer*, 57 N. Y. (12 Sick.) 49, 63; *Harvey v. Mitchell*, 31 N. H. 575; *Abbott v. Abbott*, 53 Me. 360, 361; *Lippett v. Kelley*, 46 Vt. 516; *Doane v. Willcutt*, 16 Gray, 368, 371; *Law v. Hempstead*, 10 Conn. 23; *Bass v. Mitchell*, 22 Texas, 285, 294; *Jackson v. Clark*, 7 Johns. 217; *Goosey v. Goosey*, 48 Miss. 210.

Where the language used by the parties to a contract is indefinite and ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. *Chicago v. Sheldon*, 9 Wall. (U. S.) 50.

§ 14. **Against grantor, promisor, etc.** Where the words or terms used are doubtful or ambiguous, they are construed or taken most strongly against the person who gives or undertakes, or enters into an obligation. *Deblois v. Earle*, 7 R. I. 26; *Pike v. Munroe*, 36 Me. 309; *Mills v. Catlin*, 22 Vt. 98; *Jackson v. Blodgett*, 16 Johns. 172; *Charles River Bridge v. Warren Bridge*, 11 Peters, 589; *Evans v. Saunders*, 8 Port. (Ala.) 497. Where doubt exists as to the construction of an instrument prepared by one party, upon the faith of which the other party has incurred obligations or parted with his property, that construction should be adopted which will be favorable to the latter party; and where an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which upholds the right. *Noonan v. Bradley*, 9 Wall. (U. S.) 395, 407; *Barney v. Newcomb*, 9 Cush. (Mass.) 46.

Where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he knew or had reason to suppose it was understood by the promisee. *Hoffman v. Aetna Ins. Co.*, 32 N. Y. (5 Tiff.) 405, 413; *Barlow v. Scott*, 24 N. Y. (10 Smith) 40.

But a party is not bound to do acts not contracted for, merely because he knew that the other party expected and understood he would perform them. *Johnson v. Sellers*, 33 Ala. 265. And the understanding or intention of a party to a contract does not in all cases limit his liability. *White v. Van Horn*, 19 Iowa, 189. In the absence of fraud, a party is bound by his written agreement, notwithstanding he may have misapprehended the legal effect of it. *Strobecker v. Farmers' Bank*, 6 Penn. St. 41; *Holmes v. Hall*, 8 Mich. 66.

The rule that the words of an instrument are to be taken most strongly against the grantor, is one of last resort, and is applicable only where the language used will equally admit of either of two or more interpretations. *Falley v. Giles*, 29 Ind. 114; *Adams v. Warner*, 23 Vt. 411, 412; *Palmer v. Warren Ins. Co.*, 1 Story, 369. The folly or the wisdom of the contract as one or another construction might be placed upon its terms, is a dan-

gerous element to introduce into the interpretation of agreements. *Louber v. Le Roy*, 2 Sandf. 202, 220.

The words of a contract are not only to be taken most strongly against the party using them, but he is not allowed to punctuate the writing so as to affect his liability. *White v. Smith*, 33 Penn. St. 186.

§ 15. **General words.** General words may be aptly restrained according to the subject-matter, or persons to which they relate. *Broom's Leg. Max.* 646. In construing the words of any instrument, then, it is proper to consider: 1st. What is their meaning in the largest sense which, according to the common use of language, belongs to them? and, if it should appear that that sense is larger than the sense in which they must be understood in the instrument in question, then, 2ndly. What is the object for which they are used? They ought not to be extended beyond their ordinary sense in order to comprehend a case within their object, for that would be to give effect to an intention not expressed; nor can they be so restricted as to exclude a case both within their object and within their ordinary sense, without violating the fundamental rule, which requires that effect should be given to such intention of the parties as they have used fit words to express. *Id.* 648; *Borradaile v. Hunter*, 5 Man. & Grang. 639, 653; S. C., 5 Scott (N. R.), 431, 432. In all written instruments, whether public or private, general and unlimited terms are restrained and limited by particular recitals made in connection therewith. *Vaughan v. Porter*, 16 Vt. 266; *Baxter v. State*, 9 Wis. 38, 45; *Torrance v. McDougald*, 12 Ga. 526.

§ 16. **Grammatical rules how applied.** Every contract or instrument in writing ought to be grammatically written, and should be construed according to the rules of grammar. This, however, is not strictly a rule of law, for it is a principle of law that bad grammar does not vitiate an instrument. The grammatical construction is not always, in judgment of law, to be followed; and neither false English, nor bad Latin, will make void a deed, when the meaning of the party is apparent. *Broom's Leg. Max.* 686. However plain the grammatical construction of a sentence may be, if it be clear from the contents of the instrument that the apparent grammatical construction cannot be the true one; then that which, upon the whole, is the true meaning shall prevail, in spite of the grammatical construction of such particular sentence. *Waugh v. Middleton*, 8 Exch. 352, 357; *Morey v. Homan*, 10 Vt. 565. The general rule is, that all relative words

are read as referring to the nearest antecedent. But, in ascertaining the meaning of a sentence, reference is not always to be made to the next antecedent, or to the next subsequent, but regard is to be had to the subject-matter. *Nettleton v. Billings*, 13 N. H. 446; *Gray v. Clark*, 11 Vt. 583; *Churchill v. Reamer*, 8 Bush (Ky.), 256, 260, 261. In construing an instrument which was badly written and punctuated, the court, in one case, inserted a period, and made what was written as one sentence, read as two sentences. *English v. McNair*, 34 Ala. 40; *Denny, in re*, 8 Ir. R. Eq. 427. A contract is to be construed by the words in which it is written; and punctuation may aid in ascertaining its true meaning, but cannot be used to effect an alteration in the sense of the words. *White v. Smith*, 33 Penn. St. 186; *Churchill v. Reamer*, 8 Bush (Ky.), 256, 260. Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the court will first take the instrument by its four corners in order to ascertain its true meaning; if that is apparent, on judicially inspecting the whole, the punctuation will not be suffered to change it. *Ewing v. Burnett*, 11 Peters, 41, 54. As to the punctuation of statutes, see 1 Broom & Hadley's Com. 78, note 51, Wait's ed.

§ 17. **Transposition of words or clauses.** It is sometimes necessary to transpose words or clauses in giving construction to a writing, for the purpose of determining the actual intention of the parties. And, in such cases, it is not material in what part of the instrument any clause is written, as it will be read as of any place or context for the purpose of effectuating the meaning and intent of the parties. This, however, will not be done in any case except where the certain and evident intent of the parties requires it. Where the language of an instrument is neither uncertain nor ambiguous, it is to be expounded according to its apparent import; and it is not to be warped from the ordinary meaning of its terms, in order to harmonize it with uncertain suppositions, in regard either to the probable intention of the parties contracting, or to the probable changes which they would have made in their contract, had they foreseen certain contingencies. 1 Story on Cont. § 780. In giving construction to a particular clause in an agreement, it is proper to consider the situation and relation of the parties, the subject-matter of the contract, and all the other provisions of the agreement. *Williamson v. McClure*, 37 Penn. St. 402; *Tracy v. Chicago*, 24 Ill. 500.

§ 18. **Presumptions in relation to contracts.** It is the policy of the law to sustain all fair, just and legal contracts ; and, therefore, where there is a doubt whether a particular contract is legal or illegal, a preference will be given to that construction which will render it legal, when that construction is consistent with the entire language and terms of such contract. *Archibald v. Thomas*, 3 Cow. 284; *Chittenden v. French*, 21 Ill. 598; *Merrill v. Melchoir*, 30 Miss. 516. Persons are presumed to have acted legally in making a contract, until the contrary is shown. *Tucker v. Streetman*, 38 Texas, 71.

§ 19. **Contracts partly printed, and partly written.** Where an instrument is partly printed and partly written, the latter portion will be preferred to the former, where there is a discrepancy or contradiction between the two parts. *Harper v. Albany Mutual Ins. Co.*, 17 N. Y. (3 Smith) 194; *American Express Co. v. Pinckney*, 29 Ill. 392; *Howard Fire Ins. Co. v. Bruner*, 23 Penn. St. 50; *Moore v. Perpetual Ins. Co.*, 16 Mo. 98.

Printed blank forms which are intended to be subsequently filled up by writing are in common and extensive use, as in the case of insurance policies, and in such cases the written part prevails. *Ib.* It is clear in such cases that what is printed is intended to apply to large classes of contracts, and not to any one exclusively ; and the blank spaces are left for the purpose of giving room for the insertion of special statements or provisions, which may relate to or affect particular contracts subsequently entered into. In giving construction to such contracts the courts assume that the attention of the parties was more particularly called to that portion of it which is in writing, than to the general expressions of the printed part. *Weisser v. Maitland*, 3 Sandf. 318, 322; *Woodruff v. Commercial Mut. Ins. Co.*, 2 Hilt. 122.

The rule that written prevails over printed matter applies to other transactions than contracts. An elector who uses a printed ballot and writes upon it the name of a candidate as a substitute for the printed name, will be deemed to have intended to vote for the person whose name is thus written, even though the printed name be not erased. *People v. Saxton*, 22 N. Y. (8 Smith) 309.

§ 20. **Effect of custom or usage.** Custom sometimes has an influence upon contracts. But custom and usage are not to be considered as the same things. Custom is the thing to be proved, and usage is the evidence by which the existence of the custom

is established. Whether a custom exists is a question of fact. But, in the proof of this matter of fact, questions of law of two kinds may arise. One is, whether the evidence offered is admissible, which is to be settled by the common principles of the law of evidence. The other is, whether the facts stated or proved are sufficient in law to establish the existence of a custom. No custom can be proved or permitted to influence the construction of a contract, or to vary the rights of the parties, if the custom itself be illegal. And a custom can no more be set up against the clear intention of the parties, than it could against their express agreement. "The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it." Per DAVIS, J. *Barnard v Kellogg*, 10 Wall. 383, 390; *Callender v. Dinsmore*, 55 N. Y. (10 Sick.) 200, 208; *Kimball v. Browner*, 47 Mo. 398.

The object or office of custom or usage is not to contradict the terms of a contract, but to furnish an explanation of what would otherwise be an insufficiently expressed intention of the parties. And custom or usage may be proved, not only to explain the meaning of terms to which a peculiar and technical meaning is thus affixed, but also to supply evidence of the intentions of the parties in respect to matters with regard to which the contract itself affords a doubtful indication, or perhaps no indication whatever. *Hutton v. Warren*, 1 Mees. & Wels. 475. And, therefore, an established and well known custom may add to a contract terms or stipulations not contained in it; on the ground that the parties may be supposed to have had them in their minds as a part of their agreement, when they put upon paper or expressed in words the other part of it. *Ib.* *Lamb v. Klaus*, 30 Wis. 94. Where a custom or usage is not a general one, or is one not generally known, it will not be intended that the parties contracted with reference to it. And before a custom or usage will be permitted to affect or control the terms of a contract,

such custom or usage must be so far established, and so far known to the parties, as to render it probable that their contract was made in reference to it. *Sipperly v. Stewart*, 50 Barb. 62; *Gallup v. Lederer*, 1 Hun, 282; S. C., 3 N. Y. S. C. (T. & C.) 710; *Farmers & Mechanics' National Bank, etc., v. Sprague*, 52 N. Y. (7 Sick.) 605; *Walls v. Bailey*, 49 N. Y. (4 Sick.) 464; S. C., 10 Am. Rep. 407. To render a custom or usage of trade valid and binding, it must be known, certain, uniform, reasonable, and not contrary to law. *Bassett v. Lederer*, 1 Hun, 274; S. C., 3 N. Y. S. C. (T. & C.) 671; *Barnard v. Kellogg*, 10 Wall. 383; *Chenery v. Goodrich*, 106 Mass. 566; *South Western Freight Co. v. Stanard*, 44 Mo. 77.

A clear, certain and distinct contract is not liable to modification by proof of custom. *Simmons v. Law*, 4 Abb. Ct. App. 241; S. C., 3 Keyes, 217; *The Reeside*, 2 Sumn. 567.

A custom, to be controlling, must be general, not narrow, local, and confined, nor the mere opinion of a few persons. *Rogers v. Mechanics' Ins. Co.*, 1 Story, 606; *Renner v. Bank of Columbia*, 9 Wheat. 581; *Child v. Sun Mutual Ins. Co.*, 3 Sandf. 26; *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. 108; *Austill v. Crawford*, 7 Ala. 335; *Weber v. Kingsland*, 8 Bosw. 415. So it must be definite and certain, not vague, uncertain and indefinite. *Oelricks v. Ford*, 23 How. (U. S.) 49; *Bassett v. Lederer*, 1 Hun, 274; S. C., 3 N. Y. S. C. (T. & C.) 671. It must be uniform, not fluctuating, and occasional. *Cope v. Dodd*, 13 Penn. St. 33; *United States v. Buchanan*, 8 How. (U. S.) 83, 102; *Lawrence v. McGregor*, Wright, 193. It must be reasonable. *Bowen v. Stoddard*, 10 Metc. (Mass.) 380; *Jordan v. Meredith*, 3 Yeates, 318; *Browning v. Long Island R. Co.*, 2 Daly, 117.

A custom or usage which is illegal, or one that violates the provisions of a statute, cannot be enforced. *New York Firemen Ins. Co. v. Ely*, 2 Cow. 678; *Perkins v. Franklin Bank*, 21 Pick. 483. Proof of a local usage in a particular trade is not admissible to control the rules of law upon the subject. *Higgins v. Moore*, 34 N. Y. (7 Tiff.) 417; *Groat v. Gile*, 51 N. Y. (6 Sick.) 431.

§ 21. **Of the law of place.** It may be stated as a general rule, that a contract which is valid by the law of the place where it is made is valid everywhere; and, on the other hand, if it is void or illegal by the law of the place where it is made, it is void everywhere. *Gassett v. Godfrey*, 26 N. H. 415; *Bank of United States v. Donnelly*, 8 Peters, 361; *Pearsall v. Dwight*, 2 Mass.

88; *Smith v. Mead*, 3 Conn. 253; *Houghtaling v. Ball*, 20 Mo. 536; *Evans v. Kittrell*, 33 Ala. 449; *Phinney v. Baldwin*, 16 Ill. 108; *McAllister v. Smith*, 17 id. 328; *Brown v. Nevitt*, 27 Miss. 801; *Shelton v. Marshall*, 16 Texas, 344.

There is an exception to the general rule, that a contract which is valid at the place where made is valid in all places, and that is, where the contract is injurious to the public rights, offensive to the morals, or in contravention of the policy or laws of the place where it is sought to be enforced. *Van Reimsdyck v. Kane*, 1 Gallison, 371; *Harvey v. Richards*, 1 Mason, 381; *Blanchard v. Russell*, 13 Mass. 1; *Lodge v. Phelps*, 1 Johns. Cas. 139; *Hall v. Costello*, 48 N. H. 176; S. C., 2 Am. Rep. 207; *Hinds v. Bazealle*, 3 Miss. 837; *Kanaga v. Taylor*, 7 Ohio St. 134; *Crosby v. Huston*, 1 Texas, 203; *Martin v. Hill*, 12 Barb. 631.

The general rule of exposition is, that a contract is to be construed according to the law or custom of the place where it was made, if the actual intention of the parties in this respect is not expressly stated, but is left to be inferred from the nature, objects and occasion of the contract. *Bank of Orange County v. Colby*, 12 N. H. 520; *Bryant v. Edson*, 8 Vt. 325; *Wilcox v. Hunt*, 13 Peters, 378, 379; *Pope v. Nickerson*, 3 Story, 484; *Trimbey v. Vignier*, 1 Bing. (N. C.) 151, 159; *De la Vega v. Vianna*, 1 B. & Ad. 284.

So, in general, the construction and force of a contract is to be governed by the law of the country where it is to be performed. *Lee v. Selleck*, 33 N. Y. (6 Tiff.) 615; *Hall v. Costello*, 48 N. H. 176; S. C., 2 Am. Rep. 207; *Tillotson v. Tillotson*, 34 Conn. 335; *Hunt v. Standart*, 15 Ind. 33; *Peck v. Hibbard*, 26 Vt. 698; *Sherman v. Gassett*, 9 Ill. 521; *Broadhead v. Noyes*, 9 Mo. 56.

A contract which is to be performed partly in one country and partly in another country has a double operation, and each part is to be construed according to the laws of the country in which it is to be performed. *Pope v. Nickerson*, 3 Story, 485; *Lee v. Selleck*, 32 Barb. 522; 20 How. 275; 33 N. Y. (6 Tiff.) 615; *Pomeroy v. Ainsworth*, 22 Barb. 118; *Chapman v. Robertson*, 6 Paige, 627; *Peck v. Mayo*, 14 Vt. 33.

§ 22. *Of time of contract.* A contract is sometimes to be construed according to the laws and usages existing at the time of its execution. And this will lead to a consideration of the state of the country, the manners of society, and the customs which pervaded and modified contracts at that time.

But where the language of an instrument is clear and precise,

that must control ; and it is only where the language is doubtful or obscure that such extrinsic evidence is admissible. *Adams v. Frothingham*, 3 Mass. 360.

§ 23. **Of parol evidence to explain or contradict contracts.** The rule, as to admitting parol evidence for the purpose of varying or contradicting a written instrument, is, that where there is no ambiguity in the terms used, the agreement or instrument itself is the only evidence or criterion of the intention of the parties ; and this principle excludes all prior or contemporaneous parol evidence contradictory to the writing itself, even though such evidence might clearly show that the real intention of the parties was at variance with the particular expressions used in the written instrument *Hakes v. Hotchkiss*, 23 Vt. 231; *Wakefield v. Sledman*, 12 Pick. 572; *Morss v. Salisbury*, 48 N.Y. (3 Sick.) 636; *Strohecker v. Farmers' Bank*, 6 Penn. St. 41; *Hair v. La Brouse*, 10 Ala. 548; *Colwell v. Lawrence*, 38 N. Y. (11 Tiff.) 71; 36 How. 306; 5 Trans. App. 307.

A written contract generally contains the deliberate, definite, and final agreement of the parties, and therefore parol evidence of the negotiations prior to the execution of the written instrument is inadmissible either to vary or to contradict the writing. *Harnor v. Graves*, 15 C. B. 667; S. C., 29 Eng. Law & Eq. 220; *Cook v. Combs*, 39 N. H. 592; *Hakes v. Hotchkiss*, 23 Vt. 231; *Carter v. Hamilton*, 11 Barb. 147; *Fitch v. Woodruff & Beach Iron Works*, 29 Conn. 82; *Kain v. Old*, 2 B. & C. 634.

If, however, the language of the contract is ambiguous, obscure, or technical, parol evidence may be admitted to show the true meaning of the words used, and the intention of the parties. See *ante*, §§ 5, 11, 12, 13, 17, 19, 20. This subject need not be pursued further in this place, as it will be incidentally discussed in the various subsequent titles of this work.

TITLE II.

OF ACTIONS FOUNDED UPON TORTS.

ARTICLE I.

IN GENERAL

Section 1. Rules, definitions, and illustrations. The law in relation to contracts, express or implied, having been discussed as fully as is required in this part of the work, it now remains a part of the task to explain some of the elementary principles of law

which relate to torts or wrongs. In a subsequent part of this work the subject of torts will be very fully discussed. A tort may be described, generally, as a wrong independent of contract. It involves the idea, if not of some infraction of law, at all events of some infringement or withholding of a legal right, or some violation of a legal duty. Actions for torts will lie in several different classes of cases, such, for instance, as for an injury to the person or to personal rights; for the wrongful taking or conversion of personal property; for an injury to personal or real property, and the like cases. The right of action for a tort is generally founded, either upon an invasion of some legal right of person or property, or on the violation of some duty toward the public which has resulted in some damage to the plaintiff, or on the infraction of some private duty or obligation which has been productive of damage to the complaining party. The importance of having a correct perception of the nature of a right of action founded upon a tort or wrong independent of contract, will justify a brief examination of each of the three classes just specified.

The first class of cases relates to those instances in which complaint is made of the invasion of some legal right which is actually in the possession of the plaintiff, and to the enjoyment of which he is exclusively entitled, as where a wrong is done to the person or to the reputation, where goods are tortiously converted, or a direct injury is done to property. In such cases, a plaintiff, to entitle himself to the recovery of damages, may be called upon to prove two things; first, the existence of the right alleged; and secondly, that it has been violated by the defendant.

The existence of the right alleged or claimed will always have to be established by a reference to legal principles. Sometimes this right admits of easy proof, as in an action for a trespass in taking away goods, where the plaintiff would have a *prima facie* case sufficient to entitle him to recover, upon merely proving his own previous possession of the goods, and that they were subsequently tortiously taken out of it by the defendant, and the reason of this is, that a bare possession of goods gives a right of action against a wrong-doer, for his invasion of the plaintiff's right of possession or property. In other cases the proof may not be so simple, for the facts to be established may have to be deduced from a mass of details more or less complicated, and from facts and circumstances which may be direct or very remote in their bearing upon the questions; and further, the existence of the right, as a matter of law, after the facts are established,

may have to be proved by an appeal to elementary principles and deductions ingeniously drawn from them by a discussion of general doctrines of public policy, or by embarrassing inquiries touching the intention of the legislature.

In the second class of cases, an action of tort may be founded upon the violation of some public duty toward the public, and the consequent damages to the plaintiff. To maintain an action in this class of cases, the plaintiff must prove three different matters, that is to say : the existence of the alleged duty, its breach, and the resulting damage. The existence of the duty must be shown, either by bringing the facts of the case within the reach and control of some acknowledged or settled doctrine of the common law, or by showing that they are within the words, spirit, or purview of an act of the legislature. Whenever a duty has to be performed toward the public by an individual, and another is specially injured in consequence of the non-observance or non-discharge of such duty, or through misfeasance or malfeasance in its discharge, an action will lie at the suit of the latter against the former. The breach of a public duty which causes damages to an individual, combines, in reality, two tortious ingredients, which are, according to circumstances, more or less clearly distinguishable from each other ; one is the wrong done to the public, the other, the wrong done to the individual complaining. That which is, in strictness, correlative to a public duty, is a right enforceable at the suit of the public. But, then, the general rule of law is well settled, that individuals cannot enforce a public right, or redress a public injury, by suits in their own names. Where they suffer wrong, or sustain damages in common with other members of the community, no personal right of action thence accrues. The private grievance is merged in that of the public ; and the remedy, if any exists, will be by public prosecution, in order that the rights of the public may thus be vindicated. Even where one person sustains an injury in common with the public, and from circumstances in which he happens to be placed, suffers more frequently or more severely than others, he will not, on that account, have, as of course, a separate right of action. It is only where he suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him. It may be repeated, that in every case belonging to the class now under consideration, it will be found as an ingredient of the right of action, that the defendant is chargeable with some nonfeasance, misfeasance, or malfeasance

of a public duty, constituting an offense, whether indictable or not, against the public, and also an injury productive of special damage to an individual. Where, then, a private action is brought for the recovery of damages caused by a breach of a public duty, the damage, and not the breach of duty, is that for which the plaintiff sues; his object being, not to vindicate a right on behalf of the public, but to recover compensation for a wrong done to himself. Between the public and the private wrong, concurring in a cause of action of the kind now alluded to, the distinction should always be carefully traced out. The mode of tracing it is illustrated by the following case, in which an action was brought against a witness for disobeying a subpoena; and the court observed: "That, in such an action, brought for a breach of duty, not arising out of a contract between the plaintiff and the defendant, but for disobeying the order of a competent authority, the existence of actual damage or loss is essential to the action; as the law will not imply a loss to the plaintiff from mere disobedience to the subpoena." *Couling v. Cox*, 6 C. B. 703. In other words, the law will here discriminate between the breach of the public duty and the personal injury, which form the component elements of the complete right of action. In the case just mentioned, the right of action was founded upon the breach of a public duty, existing at the common law, and productive of damage to the plaintiff. But a public duty may also be imposed, in part or wholly, by the statute law; and when this is so, the precise nature and extent of the statutory duty must, of course, be determined by reference to the words of the act creating it. In *Ewer v. Jones*, 6 Mod. 27, Lord Holt said: "Wherever a statute enacts any thing, or prohibits any thing for the advantage of any person, that person shall have a remedy to recover the advantage given to him, or to have satisfaction for the injury done to him, contrary to law, by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity." This expression is equivalent to saying that, "where a statute gives a right, then, although in express terms it has not given a remedy, the remedy which by law is properly applicable to that right, follows as an incident." MAULE, B., *Braithwaite v. Skinner*, 5 Mees. & Wels. 327.

In the third place, a right of action for a tort may be founded on the infraction of some private compact, or of some private duty or obligation, and consequential damages to the complain-

ant. Any duty, moreover, must in strictness be deemed "private," which is to be observed, not toward the community at large, but in relation to one or more of its members. The class of private duties is consequently extremely large; it comprehends duties flowing from express or implied contracts, from bailments, from the relation of master and servant, or of landlord and tenant, and from the occupancy of land, etc. Now, in any case referable to this class, the plaintiff must, in order to sustain his action, be able to prove some kind of contract or obligation out of which the specific duty, with a breach whereof the defendant is charged, will flow in legal contemplation, or he must adduce evidence of facts establishing such relation between the defendant and himself, that such specific duty will result. And further than this he must also show a breach of the duty thus raised, and consequential damage to himself. A private duty may exist at common law, for a breach of which, if coupled with consequential damage, an action will be maintainable. Although a tort differs essentially from a contract as a foundation for an action, it not unfrequently happens that a particular transaction admits of being regarded from two different points of view, so that, when contemplated from one of these points, it presents all the characteristics of a good cause of action upon contract; and when regarded from the other, it offers sufficient materials whereupon to found an action for a tort. Thus carriers warrant the transportation and delivery of goods intrusted to them; attorneys, surgeons and engineers undertake to discharge their duty with a reasonable amount of skill, and with integrity; and for any neglect or unskillfulness by individuals belonging to one of these professions, a party who had been injured thereby may maintain an action, either in tort for the wrong done, or for a breach of the contract at his election. In short, wherever there is a contract and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may recover either in tort or on contract, that is to say, where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment by the party upon whom the duty is cast. *Courtenay v. Earle*, 10 C. B. 83; *Howard v. Shepherd*, 9 id. 319, 321; *Brown v. Boorman*, 11 Cl. & F. 44.

Where the tort complained of thus flows from a contract, ex-

press or implied, there is manifestly a direct privity between the parties. It must not, however, be therefore inferred that privity is, in general, necessary to support an action in tort, for many of the cases just cited show that it is not so. And for the purpose of establishing the fundamental distinction between actions of tort and contract, the following cases may be instanced: A, a stage proprietor, contracts with B to carry his servant C, and in doing so, is guilty of negligence, which causes injury to C, and consequent damage, by reason of loss of service to his master. Under these circumstances, A may be sued in an action upon contract by B, and in an action of tort by C; privity not being needed to support such latter action, which is founded upon the principle, that where a coach proprietor undertakes to convey a passenger, and does so negligently, he is amenable for the consequences. *Marshall v. York, Newcastle and Berwick R. Co.*, 11 C. B. 655; PARKE, B., *Longmeid v. Holliday*, 6 Exch. 767; *Nolton v. Western R. R. Co.*, 15 N. Y. (1 Smith) 444; S. C., 10 How. 97; *Carroll v. Staten Island R. R. Co.*, 58 N. Y. (13 Sick.) 126, 134, and cases cited.

In like manner, if a mason contracts to erect a bridge, or other work, on a public road, and erects it not in accordance with his contract, and so as to be a nuisance to the highway, a third person, who sustains an injury by reason of its defective construction, may recover damages from the contractor, who will not be allowed to protect himself from liability by showing an absence of privity between himself and the injured party, or that he is also liable to another party for a breach of his contract. PARKE, B., *Longmeid v. Holliday*, 6 Exch. 767. But see *Coughtry v. Globe Woolen Co.*, 56 N. Y. (11 Sick.) 124. So, if an apothecary or a physician administers improper medicines to his patient, or a surgeon unskillfully treats him, and thereby injures his health, the apothecary, physician, or surgeon, will be liable to the patient, even where the father or friend of the patient may have employed such physician, etc., and was to pay him; for, though no such contract had been made, the physician, etc., would be liable to an action for his malfeasance, if he gave improper medicines, or if the surgeon unskillfully treated his patient. *Pippin v. Sheppard*, 11 Price, 400; *Gladwell v. Steggall*, 5 Bing. (N. C.) 733; Judgm., 6 Exch. 767. In one case, the defendant was a person whose business it was to prepare drugs for the market; and an action was brought against him to recover damages for negligently putting up, labeling and selling a jar of what purported to be the extract of

dandelion, a simple and harmless medicine, while the article actually sold was the extract of belladonna, which is a deadly poison ; and after it had passed through the hands of several dealers, a portion of the contents of the jar was sold to the plaintiff, who took it in pursuance of the prescription of a physician, as a medicine, and was, in consequence, greatly injured ; and it was held that the defendant was liable, on the ground that his negligence put human life in imminent danger ; and that the want of privity of contract did not make any difference as to his liability. *Thomas v. Winchester*, 6 N. Y. (2 Seld.) 397 ; *Fleet v. Hallenkemp*, 13 B. Monr. (Ky.) 219.

In relation to privity as an ingredient in an action founded upon tort, it is sometimes made a question how far it is necessary to allege and prove that the defendant was guilty of a fraud, as the following case will show : The plaintiff's father purchased of the defendant a gun, warranted to have been made by a particular maker, stating at the same time that the gun was required for the use of himself and his son. The plaintiff having been injured by the bursting of a gun, sued the defendant for damages in an action on the case. At the trial it was proved that the gun had not, in fact, been made by the particular individual named in the warranty ; and the general verdict, with heavy damages, was found for the plaintiff. The defendant having moved in arrest of judgment, the court was called upon to decide as if the following facts had been actually found by the jury, viz., that the defendant had *knowingly* sold the gun in question to the father, *for the purpose of being used by the plaintiff*, and had knowingly made a false warranty that this might be safely done, in order to effect the sale ; and further, that the plaintiff, *on the faith of such warranty, and believing it to be true*, used the gun, and thereby sustained damage. And it was contended, on behalf of the defendant, that there was no privity of contract between himself and the plaintiff ; that there was no breach of any public duty, nor even a violation of any private right existing between the parties to the action. The court, however, held, that the defendant, having been guilty of a deceit, was responsible for its consequences whilst the instrument sold by him was in the possession of an individual to whom his fraudulent statement had been communicated, and for whose use he knew it was purchased. *Langridge v. Levy*, 2 Mees. & Wels. 519, 531 ; S. C., 4 id. 337. It must not, however, be inferred from the preceding case, that "whenever a duty is imposed on a

person by contract or otherwise, and that duty is violated, any one injured by it may have a remedy against the wrong-doer." Judgm., 2 Mees. & Wels. 530; *Loop v. Litchfield*, 42 N. Y. (3 Hand) 351; *Losee v. Clute*, 51 N. Y. (6 Sick.) 494; S. C., 10 Am. Rep. 638. Such a principle, if recognized, would impose an indefinite extent of liability, and lead to the most absurd and outrageous consequences. This important limitation of the rule respecting privity is exemplified in a recent case. A husband and his wife sued in tort for an *injury to the wife*, caused, as the complaint alleged, by the fraudulent and deceitful warranty of a lamp sold by the defendant. The case showed that the warranty was made to the husband, and the jury *negatived the existence of* fraud, and the court held that the wife could not properly be joined as a co-plaintiff in the action, because the injury to her flowed from the breach of a contract which was made by the husband alone. *Langmeid v. Holliday*, 6 Exch. 761. The absence of fraud clearly distinguishes this case from that of *Langridge v. Levy*, last cited. The court observed: "There is no doubt that if the defendant had been guilty of a fraudulent representation that the lamp was fit and proper to be used, knowing that it was not, and intending it to be used by the plaintiff's wife or any particular individual, the wife, or that individual, would have had an action for the deceit upon the principle which all actions for deceitful representations are founded, and which was strongly illustrated in the case of *Langridge v. Levy*, viz., that if any one knowingly tells a falsehood, with intent to induce any other to do an act which results in his loss, he is liable to that person in an action of deceit. But the fraud being negatived in this case, the action cannot be maintained on that ground by the party who sustained the damages." The court then proceeded to remark that there are other cases, no doubt, besides those of fraud, in which a third person, though not a party to the contract in question, may sue for damage, if it be broken; those cases occurring, however, where, as in the examples already given, *ante*, there has been a wrong done to that person, for which he would have had a right of action, though no such contract had been made. *Coughtry v. Globe Woolen Co.*, 56 N. Y. (11 Sick.) 124, 127; *Godley v. Hagerty*, 20 Penn. St. 387.

"Fraud and deceit in the defendant and damage to the plaintiff are a sufficient foundation for the action of trespass on the case, though no benefit accrue to the defendant. The action will

lie whenever there has been the assertion of a falsehood with a fraudulent design as to a fact, when a direct and positive injury arises from such assertion." WELLES, J., *White v. Merritt*, 7 N. Y. (3 Seld.) 356, 357; *Benton v. Pratt*, 2 Wend. 385.

It may be here observed that a distinction undeniably exists between *moral* and *legal* fraud, and that there are many kinds of moral fraud which clearly could not be made available, either as a ground of action, or by way of defense before a court of law. Thus a vendor is entitled to sell for the best price he can get, and is not liable at law for a simple commendation of his own goods, however worthless they may be, provided he has not made any false statement as to their quality or condition, nor concealed any thing which he was legally bound to disclose, nor asserted any thing respecting them which may, in legal contemplation, amount to a warranty.

The cases show a distinction between legal and moral fraud. For instance, where a person purports to accept a bill of exchange by procuration, when in fact he has no such authority, that has been held to be a legal fraud, which rendered the party so acting liable to an action of deceit, although the jury negatived the existence of fraud. *Murray v. Mann*, 2 Exch. 538, 541; *Polhill v. Waller*, 3 Barn. & Ad. 114. As to the sufficiency of "legal" fraud to support an action when, unaccompanied by *any* degree of "moral" fraud, judicial opinions have conflicted. But it has been held that a principal is responsible for such representations as may be made by his agent in the transaction of his business, although such principal may be entirely ignorant of the statement, and innocent of any fraud; and any contract so made may be avoided on the part of the other party on the ground of such fraud by the agent. *Bennett v. Judson*, 21 N. Y. (7 Smith) 238; *Atwood v. Small*, 6 Cl. & Fin. 413; see these cases criticised, *Wakeman v. Dalley*, 51 N. Y. (6 Sick.) 27; S. C., 10 Am. Rep. 551. If a party makes a material misrepresentation without any knowledge whether the statement is true or false, with a view to secure some benefit to himself, or to deceive a third person, he is, in law, as much guilty of a fraud as though he knew it to be untrue or false. *ib.*; *Evans v. Edmonds*, 13 C. B. 786; *Taylor v. Ashton*, 11 Mees. & Wels. 401. But it is settled law, that independently of duty, no action will lie unless there is such a misrepresentation as that just stated, or unless the party making it knows it to be untrue, and makes it with the fraudulent intention of inducing another person to act on the faith of it, who

does so act to his injury. *Thom v. Bigland*, 8 Exch. 731; *Evans v. Collins*, 5 Q. B. 820; *Ormrod v. Huth*, 14 Mees. & Wels. 651; *Wakeman v. Dalley*, 51 N. Y. (6 Sick.) 27; S. C., 10 Am. Rep. 551; *Arthur v. Griswold*, 54 N. Y. (10 Sick.) 400. .

§ 2. Novelty of actions. It has been seen that the number of common-law principles is not very great; but their nature is such that they can be applied to new cases as they arise and require an adequate and appropriate remedy. *Ante*, 6, 7, 8.

Actions are sometimes brought in cases differing in facts from previously reported or adjudged cases; and an objection is usually urged against them that no similar action has been brought or sustained. Such an objection has force, and it is entitled to a full and careful examination by the court. But the mere fact that the action is not founded upon some prior adjudged case or precedent is no sufficient legal answer to the action, if the facts of the case show a clear right of action when tested by sound legal principles. And the courts have fully and clearly defined and settled the proper principle of adjudication in such cases. "Another argument which has been made use of is, that this is a new case, and that there is no precedent of such an action. Where cases are new in their *principle*, then I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the *instance*, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago; if it were not, we ought to blot out of our law books one-fourth part of the cases that are to be found in them." *Pasley v. Freeman*, 3 T. R. 51; 2 Smith's Lead. Cas. 92 (157), 101 (166); see, to the same effect, *Chapman v. Pickersgill*, 2 Wils. 146; *Ashby v. White*, 1 Ld. Raym. 938; S. C., 1 Smith's Lead. Cas. (342), 455 (360), 472; *Winsmore v. Greenbank*, Willes, 577. In a late English case it is said: "I agree that our judgment in this case should be in favor of the plaintiffs. This case, no doubt, involves first principles. On the one hand, the law is strongly against the invention or creation of any rights of action, but, on the other hand, where a wrong has actually been suffered by one person in consequence of the conduct of another, one is anxious to uphold as far as possible the maxim '*ubi jus ibi remedium*.'" *Western Counties Manure Co. v. Lawes Chem-*

ical Manure Co., L. R., 9 Exch. 218, 222; S. C., 10 Eng. Rep. 391, 394; but see *Osborn v. Gillett*, L. R., 8 Exch. 88.

The American cases agree with the English rule. In *Yates v. Joyce*, 11 Johns. 136, 140, 141, it is said: "This appears to be an action of the first impression. The books do not furnish a precedent in its favor. It is obvious, however, from the statement of the plaintiff's case, in the declaration, the truth of which is admitted by the demurrer, that he has sustained damage by the act of the defendant, which he alleges was done fraudulently, and with intent to injure him. It is the pride of the common law, that wherever it recognizes or creates private right, it also gives a remedy for a willful violation of it." *Gardner v. Hearth*, 3 Denio, 235. "It forms no objection to this action that the circumstances of the case are novel, and that no case precisely similar in all respects has previously arisen. The action is based upon very general principles, and is designed to afford relief in all cases where one man is injured by the wrongful act of another, where no other remedy is provided." *Van Pelt v. McGraw*, 4 N. Y. (4 Comst.) 111, 112; *Chisholm v. Gadsden*, 1 Strobb. L. 220, 224; *Adams v. Paige*, 7 Pick. 542, 550; *Raney v. Weed*, 3 Sandf. 580. It has been held that a new action will not lie, where there is redress by other existing actions. *Lamb v. Stone*, 11 Pick. 526, 532; *Barker v. Mathews*, 1 Denio. 335; and see *Moody v. Burton*, 27 Me. 427, 436; *Costigan v. Mohawk and Hudson R. R. Co.*, 2 Denio, 609, 613.

§ 3. Of fictitious or wager suits. Courts of justice were established for the purpose of deciding really existing questions of right between parties who in good faith submit a case to the court for a decision. And the court will not try an action upon a wager or an abstract question of law, or judicial practice, not arising out of circumstances really existing, in which the parties have a legal interest. *Henkin v. Guerres*, 12 East, 247; S. C., 2 Camp. N. P. 408. "I have been very unwilling to proceed to the decision of this case at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties. My confidence, however, in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this court." *Fletcher v. Peck*, 6 Cranch, 87, 147, 148. Even at the common law, actions that are founded upon wagers which are foolish, or tend to annoy

others, to waste the time of the court, or to outrage decency, will be discountenanced and refused a trial. *Eltham v. Kingsman*, 1 B. & Ald. 683; *Da Costa v. Jones*, Cowp. 729.

A court will not take cognizance of an action brought in the name of a fictitious person for the purpose of indirectly affecting a pending controversy; and the bringing of such an action is a contempt of court. *Smith v. Junction Railway Co.*, 29 Ind. 546; see, also, *Coxe v. Phillips*, Rep. Temp. Hardw. 237; *Brewster v. Kitchin*, Comb. 425. "It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves, and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, where there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court." *Lord v. Veazie*, 8 How. (U. S.) 255.

When an action will, or will not lie upon a wager. See *Wager*; see, also, *Godsall v. Boldero*, 9 East, 72; 2 Smith's Lead. Cas. (292), 262.

§ 4. **Illegal or wrongful acts.** Every action brought for a tort is founded upon some illegal, wrongful or fraudulent acts of the defendant. And, since there is no limit to the number and variety of tortious acts, no attempt will be made to explain the entire subject; but a few cases illustrative of the general principle may be usefully given. One who does a wrongful act, or a rightful act in a negligent or wrongful manner, to the injury of another, is liable to an action, as where, by reckless and noisy driving on a highway, he frightens a horse lawfully pasturing at the side of the highway, and causes him to run away and destroy a buggy. *Howe v. Young*, 16 Ind. 312. So, where a person takes measures to protect his property from imminent danger of a flood, but does not use ordinary care, and consequently causes injury to the property of other persons, he is liable. *Noyes v. Shepherd*, 30 Me. 173. So, one who obstructs a sewer, in violation of a city ordinance, is liable for the consequences of his act. *Owings v. Jones*, 9 Md. 108. So, one who has a right of way over the land of another is liable to an action if he makes an unauthorized use of such land, even though the owner does not sustain any actual damage. *Appleton v. Fullerton*, 1 Gray (Mass.), 186.

One who borrows a safe which has a combination lock and key, and returns it with the key, but locked upon a combination known only to himself, and he refuses, upon demand, to furnish the owner with the combination upon which it was locked, is liable to an action if the safe is thus rendered worthless to the owner. *Neff v. Webster*, 15 Wis. 283.

A person who, in the exercise of a legal right, does an injury to the property of another, is not liable for the damage unless it was caused by his want of the ordinary care and skill exercised in like cases. *Thomasson v. Agnew*, 24 Miss. 93. The prevention of the doing of an unlawful and unauthorized act does not, of itself, constitute a good cause of action on the part of the would-be and incipient wrong-doer. *Bangor, etc., R. R. Co. v. Smith*, 49 Me. 9, 13. There is no principle known to the law, which will enable a person, individual or corporation, to claim immunity for his wrongful acts done to the injury of another's rights, on the ground that his acts were for the public interest. *Henderson v. Railroad Co.*, 17 Texas, 560; *Trenton, etc., Co. v. Raff*, 36 N. J. L. 335.

An action on the case lies for maliciously suing out an attachment and seizing the goods of the debtor, even though there was at the time some indebtedness, where the indebtedness claimed greatly exceeds the amount due, and where the levy is grossly excessive, and the object is extortion and oppression. *Spaids v. Barrett*, 57 Ill. 289; S. C., 11 Am. Rep. 10. So, bringing an action in the name of another person without his authority is an unlawful act, and subjects the wrong-doer to an action. *Foster v. Dow*, 29 Me. 442; and see *Cotterell v. Jones*, 11 C. B. 713. But the person in whose name such suit is brought may adopt it. *Craig v. Twomey*, 14 Gray, 486.

§ 5. **Rightful acts no ground of action.** A rightful and *bona fide* exercise of a lawful power does not furnish any basis for an action. *McMillen v. Staples*, 37 Iowa, 532. An act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow; nor will a man be answerable for the consequences of enjoying his own property in the way in which such property is usually enjoyed, unless an injury has resulted to another from the want of proper care or skill on his part. *Radcliff's Exrs. v. Mayor, etc., of Brooklyn*, 4 N. Y. (4 Comst.) 195, 200; *Rockwood v. Nelson*, 11 Cush. (Mass.) 221.

A person who places a steam-boiler upon his premises and

operates it with care and skill, so that it is not a nuisance, is not, in the absence of proof of negligence or fault on his part, liable for damages to his neighbor caused by the explosion of the boiler. *Losee v. Buchanan*, 51 N. Y. (6 Sick.) 476.

A man may lawfully dig on his own land, although he cannot lawfully do so in such a manner as to cause the land adjoining to fall in the pit dug by him. *Farrand v. Marshall*, 21 Barb. 409; *Austin v. Hudson R. R. Co.*, 25 N. Y. (11 Smith) 334, 346; *Ryckman v. Gillis*, 6 Lans. 79; *People ex rel. Barlow v. Canal Board*, 2 N. Y. S. C. R. (T. & C.) 275.

The owner of one side of a party wall, between two adjoining houses, may, if the wall becomes dilapidated and unsafe, upon reasonable notice to the tenant of the opposite building, take down and rebuild such wall in a proper manner. *Partridge v. Gilbert*, 15 N. Y. (1 Smith) 601, 612. So he may increase the height of the wall, if that can be done without detriment to the wall or to the property of the adjacent owner. *Brooks v. Curtis*, 50 N. Y. (5 Sick.) 639; S. C., 10 Am. Rep. 545. Or he may underpin the foundation, sink it deeper, and increase, within the limits of his own lot, the thickness, length, or height of the party wall, if he can do so without injury to the building on the adjoining lot. *Eno v. Del Vecchio*, 4 Duer, 53; see *Daly v. Grimly*, 49 How. 520. The owner of a building, erected on the line of his lot, cannot, by lapse of time, acquire a prescriptive right to the lateral support of the adjacent soil. *Mitchell v. Mayor, etc., of Rome*, 49 Ga. 19; S. C., 15 Am. Rep. 669.

The owner of land may lawfully set fire to his fallow ground, and if he is not guilty of negligence in the mode of doing it, no action lies for any injury done to his neighbor's woodland, crops, or buildings, by fire. *Clark v. Foot*, 8 Johns. 421; *Stewart v. Hawley*, 22 Barb. 619; *Calkins v. Barger*, 44 id. 424.

A landowner may open and work a coal mine in his own land, though it may injure the house which an adjoining owner has built on the line of his land. *Partridge v. Scott*, 3 Mees. & Wels. 220.

He may do the same thing, even though it cuts off an underground stream of water, which before supplied his neighbor's well. *Acton v. Blundell*, 12 Mees. & Wels. 324; *Ellis v. Duncan*, 21 Barb. 230; 11 How. 515; 50 Barb. 325. He may lawfully dig a well upon his own premises, although it intercepts the percolation or underground currents of water, and thus prevents the water from reaching the springs or open running stream on

the land of another person. *Village of Delhi v. Youmans*, 45 N. Y. (6 Hand) 362; S. C., 6 Am. Rep. 100; *Bliss v. Greeley*, 45 N. Y. (6 Hand) 671; S. C., 6 Am. Rep. 157.

He may build upon his land, although it obstructs or shuts out the light from his neighbor's house. See *Ancient Lights*, and *Parker v. Foote*, 19 Wend. 309; *Mahan v. Brown*, 13 id. 261.

§ 6. **Legislative authority for acts done.** As a general rule, no action lies for an act done by virtue of a statute authority, if the statute is strictly pursued, and there is no negligence, or want of due care and skill in performing the act. *Vaughan v. Taff Vale Railway Co.*, 5 H. & N. 679; 3 id. 752, note; *Chapman v. Atlantic & St. Lawrence R. R. Co.*, 37 Me. 92; *Burroughs v. Housatonic R. R. Co.*, 15 Conn. 131, 133; *Rood v. New York & Erie R. R. Co.*, 18 Barb. 80; *Herring v. Wilmington & Raleigh R. R.*, 10 Ired. 402; *First Baptist Church v. Utica & Schenectady R. R. Co.*, 6 Barb. 313, 318; *Sunbury & Erie R. R. Co. v. Hummell*, 27 Penn. St. 99; *Morris, etc., R. R. Co. v. Newark*, 10 N. J. Eq. (2 Stockt.) 352.

But if the statutory powers are exceeded, or are not strictly pursued, or the acts authorized to be done are carelessly and negligently done, an action lies to recover the damages resulting. *Brownlow v. Metropolitan Board of Works*, 13 C. B. (N. S.) 768; 16 id. 546; *Freemantle v. London & North-western Railway Co.*, 10 C. B. (N. S.) 89; *Fero v. Buffalo & State Line R. R. Co.*, 22 N. Y. (8 Smith) 209; *Huyett v. Philadelphia & Reading R. R. Co.*, 23 Penn. St. 373.

The appropriation of land for a canal, by the authorized agents of the State, confers a right to enter upon and use the soil, although the absolute fee does not vest in the State till the appraisalment of damages. *Baker v. Johnson*, 2 Hill, 342; *Rexford v. Knight*, 11 N. Y. (1 Kern.) 308.

But the authority conferred upon the canal commissioners to enter upon and take possession of lands of an individual for the construction of, or for the temporary use of, the canals, cannot be delegated unless there be special power of substitution. *St. Peter v. Denison*, 58 N. Y. (13 Sick.) 416; *Lyon v. Jerome*, 26 Wend. 485. And a contractor cannot justify a trespass upon private lands because such act was necessary in the performance of his contract. *Ib.* Casting stones and earth upon the lands of an adjoining land proprietor, by means of a blast from the bed

of the canal, by a contractor with the State, is a trespass, even though the work was done without negligence. *Ib.*

The acts and things authorized by statute to be done are numerous and varied, and no attempt will be here made to enumerate them, as many of them will be noticed in various parts of this work.

§ 7. **Consent of injured party.** It is a general rule of law that no person can maintain an action for a wrong where he has consented to the act which occasions his loss. *Broom's Leg. Max.* 268; *Illinois Central R. R. Co. v. Allen*, 39 Ill. 205; *Walker v. Fitts*, 24 Pick. 191; *Phillips v. Wooster*, 36 N. Y. (9 Tiff.) 412; 3 Abb. (N. S.) 475; 2 Trans. App. 254; *State v. Beck*, 1 Hill (S. C.), 363; *Pillow v. Bushnell*, 5 Barb. 156.

§ 8. **Demand or notice before suit brought.** In actions for torts there are many cases in which no notice or demand is requisite before bringing the action. Again, there are numerous instances in which a demand is necessary for the purpose of completing the right of action. In replevin, and in trover, a demand is necessary in some cases, and unnecessary in others. See *Replevin*; *Trover*; *Nuisance*; *Ejectment*; *Injunctions*. In the different titles the cases in which a demand is required before suit brought will be sufficiently noticed.

§ 9. **Splitting demands.** The objection to splitting demands, and bringing separate actions upon the several parts, is usually made in relation to actions founded upon contracts. See *Splitting Cause of Action*:

Where there has been a trespass in taking personal property, or an unlawful conversion of it, by one single indivisible act in relation to the several articles taken or converted, there is but a single cause of action, and the plaintiff cannot split his claim for damages, by bringing separate actions of trespass or trover for each particular article seized or converted; and, therefore, a recovery for one part or parcel of the goods is a bar to an action for another part or parcel. *Farrington v. Payne*, 15 Johns. 432; *Herriter v. Porter*, 23 Cal. 385; *Brannenburg v. Indianapolis, etc., R. R. Co.*, 13 Ind. 103; *Bates v. Quattlebom*, 2 Nott & McCord (S. C.), 205.

§ 10. **Of damages not caused by wrongs not actionable.** To constitute a tort, two things must concur, actual or legal damage to the plaintiff, and a wrongful act by the defendant. But it is not every substantial wrong, still less every imaginary grievance, which affords a right of action for redress. Nor is it true,

that for every kind of damage or loss occasioned by the act of another, a remedy is given by the law. It not unfrequently happens, that damage, palpable and undeniable though it be, is, in technical phraseology, *damnum sine injuria*, that is, damage, unaccompanied by any tortious or wrongful act whereof cognizance can be taken in a court of justice. Broom's Com. on Com. Law, 75.

The word *injuria* is employed as signifying a "legal wrong," that is, a wrong cognizable or recognized as such by the law. The word *damnum* is used as signifying "damage," not necessarily pecuniary, or perceptible, but appreciable, and capable, in legal contemplation, of being estimated by a jury. The proposition, *damnum sine injuria*, is, that damage, unaccompanied by legal wrong, is not actionable at law.

A person may sustain serious damage by the acts of another, and yet, if it be the result of inevitable accident, or of a lawful act, done in a lawful manner, without any carelessness or negligence, there is no legal injury, and no tort giving rise to an action for damages, *ante*. One who is acting in self-defense, and in good faith, in protecting himself from the wrongful acts of another, will not be liable to a third person, who is injured by such acts of self-defense. *Richer v. Freeman*, 50 N. H. 420; S. C., 9 Am. Rep. 267; *Scott v. Shepherd*, 2 W. Bla. 892; S. C., 3 Wils. 403; 1 Smith's Lead. Cas. (549), 754. See *Vandenburgh v. Truax*, 4 Denio, 464. For a further illustration of the acts one may do without liability to an action, see *ante*, § 5.

Judges of the superior courts of record are not liable to answer personally for acts done by them in a judicial capacity, or for errors of judgment. *Yates v. Lansing*, 5 Johns. 282; 9 id. 395; *Cunningham v. Bucklin*, 8 Cow. 178; and the English courts hold that at common law no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly. *Fray v. Blackburn*, 3 B. & S. 576; *Thomas v. Churton*, 2 id. 475.

In this country the same rule prevails in all of the States. *Randall v. Brigham*, 7 Wall. 523; *Howe v. Mason*, 14 Iowa, 510; *Downing v. Herrick*, 47 Me. 462; *Robbins v. Gorham*, 25 N.Y. (11 Smith) 538; 26 Barb. 586; *Burnham v. Stevens*, 33 N. H. 247; *Ambler v. Church*, 1 Root, 211; *Pratt v. Gardner*, 2 Cush. (Mass.) 63.

§ 11. Of wrong without actual damage, though actionable. The proposition *injuria sine damno* frequently suffices as the founda-

tion at an action; the phrase being used to indicate a wrong — remediable at law — though not productive of *actual* damage to the complainant. The phrase applies only where a *legal* injury has been done, or where a *legal* right has been violated. To illustrate this principle, it is well settled that a judge or inspector of elections who wrongfully and maliciously refuses to receive the vote of an elector is actionable. *Ashby v. White*, 2 Ld. Raym. 938; S. C., 1 Smith's Lead. Cas. (342), 455; *Jenkins v. Waldron*, 11 Johns. 114; *Blanchard v. Stearns*, 5 Metc. (Mass.) 298; *Wheeler v. Patterson*, 1 N. H. 88; *Swift v. Chamberlain*, 5 Conn. 537; *Carler v. Harrison*, 5 Blackf. 138; *State v. Porter*, 4 Harr. (Del.) 536; *Rail v. Potts*, 8 Humph. 225. A continuing tortious act which injuriously affects the property of another, is actionable, even though no appreciable damage results from it, *ante*, 40. One who stops on the sidewalk of a street, in front of a man's house, and remains there, using toward the owner insulting and abusive language, is liable to an action. *Adams v. Rivers*, 11 Barb. 390, 398. Bringing an action in the name of another person, without his consent, is actionable, *ante*, 143, § 4. An action lies against a banker, who has sufficient funds in his hands belonging to a customer, but who refuses to cash the check of the latter, even though he did not sustain any actual loss or damage. *Marzetti v. Williams*, 1 B. & Ad. 415; *Cumming v. Shand*, 5 H. & N. 95; *Gray v. Johnston*, L. R., 3 H. L. 1; *Palin v. Steward*, 14 C. B. 595. Trespass lies for an entry upon the land of another, though no real damage be occasioned thereby, for repeated acts of going over the land might eventually be relied upon as evidence of title to do so. *Troyman v. Knowles*, 13 C. B. 222. An action lies for an unlawful diversion of the water from the plaintiff's mill, even though no actual damage be shown, as such use might in time ripen into a right. *Blanchard v. Baker*, 8 Greenl. (Me.) 253; *Rochdale Canal Co. v. King*, 14 Q. B. 122, 136; *Webb v. Portland Manufacturing Co.*, 3 Sumner, 189; *Wilts and Berks Canal Navigation Co. v. Swindon Waterworks Co.*, L. R., 9 Ch. App. 451; 43 L. J. Chanc. 393; 30 L. T. (N. S.) 443; 22 W. R. 444. So of a nuisance in obstructing the works of a canal company. *Delaware and Hudson Canal Co. v. Torrey*, 33 Penn. St. 143, or for cutting and taking away the grass which grows on the side of a highway laid out over the plaintiff's land. *Cole v. Drew*, 44 Vt. 49; S. C., 8 Am. Rep. 363.

§ 12. **Damages when too remote, and when not.** There are cases in which injuries have been done that were productive of

damage to another, which, in legal contemplation, were too remote to enable the injured party to redress. Thus in an action for slander, where special damages are necessary to sustain the action, it is not sufficient to prove a mere wrongful act of a third person, induced by the slanderer, such as that he dismissed the plaintiff from his employ before the end of the term for which they had contracted. *Vicars v. Wilcocks*, 8 East, 1; S. C., 2 Smith's Lead. Cas. (460), 484, where numerous cases are cited. See *Sneesby v. Lancashire, etc., Railway Co.*, L. R., 9 Q. B. 263; S. C., 8 Eng. R. 337, in which the damages were held not to be too remote in an action for negligence; see, also, *Kelly v. Partington*, 5 B. & Ad. 645. A husband cannot maintain an action for damages resulting from the illness and mental depression of his wife arising from the speaking of her certain defamatory words, not actionable in themselves. *Wilson v. Goit*, 17 N. Y. (3 Smith) 442. See *Bassell v. Elmore*, 48 N. Y. (3 Sick.) 561.

The special damage necessary to support an action for defamatory words, not actionable in themselves, must result from an injury to the plaintiff's reputation, which affects the conduct of others toward him; his mental distress, physical illness and inability to labor, occasioned by the slander, are not such natural and legal consequences of the words spoken, as to give an action. *Terwilliger v. Wands*, 17 N. Y. (3 Smith) 54. A general allegation in a complaint that the slanderous charge injured the plaintiff in her good name, and caused her relations and friends to slight and shun her, does not set forth sufficient special damage. *Bassell v. Elmore*, 48 N. Y. (3 Sick.) 561.

An action does not lie in favor of the manager of a theater against one who publishes a libel on an opera singer, who had been engaged to sing, but was deterred from doing so by reason of the publication of the libel, and for fear that the libel would induce third persons to assault her. *Ashley v. Harrison*, 1 Esp. 49; Peake, 194. So no action can be maintained by a parent against a town school teacher for refusing to instruct the children of the former. *Spear v. Cummings*, 23 Pick. 224, nor for admitting colored children as scholars. *Stewart v. Southard*, 17 Ohio, 402.

One who has agreed to support certain paupers, in sickness or in health, for a specified time, for a fixed sum, cannot maintain an action against a third person for assaulting and beating one of the paupers, and thus causing extra expense for his cure and support. *Anthony v. Slaid*, 11 Metc. (Mass.) 290.

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No action lies by a creditor against a third person who induces a debtor not to pay, and an officer not to collect, a demand which was placed in his hands for that purpose (*Platt v. Potts*, 13 Ired. 455); nor can a creditor maintain an action against a third person, for aiding the debtor of the former to remove with his property out of the State. *Matthews v. Pass*, 19 Ga. 141. The commissioner's court of a county cannot maintain an action against the keeper of a poor-house for debauching and getting with child one of the inmates. *Commissioners, etc., v. McCann*, 23 Ala. 599. An action does not lie against a witness for testifying falsely in a cause. *Grove v. Brandenburg*, 7 Blackf. 234; *Dunlap v. Glidden*, 31 Me. 435; *Dampport v. Sympson*, Cro. Eliz. 520. A man who mounts a pile of flag-stones in a street, for the purpose of making a speech, and thus attracts a crowd of persons, some of whom also get upon the stones and break them, is not liable, as a necessary legal conclusion, for the damages; but the question whether his act was the proximate or the remote cause of the injury is for the jury. *Fairbanks v. Kerr*, 70 Penn. St. 86; S. C., 10 Am. Rep. 664.

TITLE III.

OF PRINCIPLES RELATING TO SUITS IN EQUITY.

ARTICLE I.

RULES AND ILLUSTRATIONS.

Section 1. Courts of equity do not act when a legal remedy exists. Some of the rules applicable to courts of equity have already been pointed out, *ante*, 20. But there are some general principles that may properly be more fully noticed in this place. In those countries or States in which the rules of law, and the principles of equity are administered by distinct and separate courts, it is a well-settled general rule, that courts of equity have jurisdiction in cases of rights which are recognized and protected by the municipal jurisprudence, and where a plain, adequate and complete remedy cannot be had in the courts of common law. The remedy must be *plain*; for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be *adequate*; for, if at law, it falls short of what the party is entitled to, that founds a jurisdiction in equity. It must be *complete*;

that is, it must attain the full end and justice of the case. It must *reach the whole mischief*, and *secure the whole right* of the party in a perfect manner, at the present time, and in future; otherwise, equity will interfere and give such relief and aid as the exigency of the particular case may require. The jurisdiction of a court of equity is, therefore, sometimes concurrent with the jurisdiction of a court of law; it is sometimes exclusive of it; and it is sometimes auxiliary to it.

The inadequacy of legal remedies has frequently been the reason assigned for equitable jurisdiction and interference. And, on the other hand, the sufficiency of remedies at law have furnished grounds to courts of equity in declining to exercise any jurisdiction in the particular matter or case. The remedy at law must be *plain*, to oust courts of equity of jurisdiction, or to cause them to decline acting in the matter. The existence of a merely problematical remedy at law does not deprive a party of his remedy in equity. *Edsell v. Briggs*, 20 Mich. 429. It is no bar to proceedings in equity that the plaintiff may, by great circuitry and at great inconvenience, at last secure a remedy at law; his remedy must be plain and adequate. *Carlton v. Felder*, 6 Rich. Eq. (S. C.) 58, 67. A court of equity will intervene in the administration of an estate where the bill shows an irreparable injury to be impending, against which the probate court is powerless to grant relief, as where an administrator withholds proceeds, has been adjudged a bankrupt, and owes debts of a fiduciary character. *Haag v. Sparks*, 27 Ark. 594. A remedy in a court of law is the only "remedy at law" which is sufficient to oust a court of equity of its jurisdiction; and, when stock in a corporation is transferred, without consideration, for the fraudulent purpose of controlling an election, an injunction is the proper remedy to prevent the transferees from voting. *Webb v. Ridgely*, 38 Md. 364. A bill which shows that the defendant has wrongfully removed a monument which the complainant had erected to the memory of deceased persons, will be retained; for, since the property in question is of a peculiar character for which a full compensation in damages could not be obtained in a court of law, a court of equity has jurisdiction to enjoin any further interference with the monument, if not to compel its restoration. *McCollum v. Morrison*, 14 Fla. 414.

Again, a court of equity will not be ousted of jurisdiction unless the remedy at law is *adequate*. To render a bill in equity demurrable on the ground that the complainant has a remedy at

law, that remedy must appear to be adequate and complete. *Scott v. Scott*, 33 Ga. 102; *Witter v. Arnett*, 8 Ark. (3 Eng.) 57.

Although a remedy at law may exist, yet if a complaint is one of equitable jurisdiction, chancery will sometimes take cognizance of it, where its aid is more effectual. *Morris v. Thomas*, 17 Ill. 112; *Babcock v. McCamant*, 53 id. 214; *Rutherford v. Jones*, 14 Ga. 521; *Jordan v. Faircloth*, 27 id. 372; *Clouston v. Shearer*, 99 Mass. 209.

A bill in equity will not lie for the recovery of money held in trust, when the plaintiff has a plain, adequate and complete remedy by an action at law for money had and received. *Crooker v. Rogers*, 58 Me. 339.

A bill in equity will be dismissed if the record shows that the complainant has a complete and adequate remedy at law. *Seago v. Harrison*, 42 Ga. 189; *Miller v. Neiman*, 27 Ark. 233. A court of equity will not grant relief by injunction or new trial, if the party seeking relief has an adequate remedy by motion to the court in which the judgment was obtained. *Lyme v. Allen*, 51 N. H. 242; *Day v. Cummings*, 19 Vt. 496; *Musgrove v. Chambers*, 12 Tex. 32.

A court of equity will not interfere in a case where the aggrieved party has a remedy by appeal. *Hazelhurst v. Mayor, etc., of Baltimore*, 37 Md. 199. An objection that the complainant has an adequate remedy at law ought to be made promptly, or it may be disregarded. *Sexton v. Pike*, 13 Ark. 193; *Cumming v. Mayor, etc., of Brooklyn*, 11 Paige, 596; *Jennings v. Whittemore*, 2 N. Y. S. C. (T. & C.) 377, 379. If such a defense is not set up in the answer, it will not be available at the hearing. *Truscott v. King*, 6 N. Y. (2 Seld.) 147.

§ 2. *Equity follows the law.* It is a common maxim, that equity follows the law; and, it is susceptible of several interpretations. One of these may be, that equity adopts and follows the rules of law in all those cases in which such rules are, in terms, applicable. Another may be, that equity, in dealing with cases of an equitable nature, adopts and follows the analogies furnished by the rules of law. The maxim is true in both of these senses when properly applied to different cases and different circumstances; but, it is not universally true in either sense; or, in other words, it is not a rule of universal application. If there is a plain, direct, positive rule of common law, or an express statute, which governs the case with all its circumstances, or some particular point, a court of equity is as much

bound by it as a court of law, *ante*, § 7. In the construction of written instruments the same general rules govern at law or in equity, *ante*, 116, art. 8, § 4. Courts of equity discountenance neglect or *laches*; and, the statute of limitations will be enforced by them as readily as by courts of law. *Kane v. Bloodgood*, 7 Johns. Ch. 90; S. C., 8 Cow. 360; *Clark v. Ford*, 1 Abb. Ct. App. 359; 3 Abb. (N. S.) 245; 34 How. 478; 3 Keyes, 370; 1 Trans. App. 22; *Chapman v. Butler*, 22 Me. 191; *Phillips v. Rogers*, 12 Metc. (Mass.) 405; *Wagner v. Baird*, 7 How. (U. S.) 234; *Maxwell v. Kennedy*, 8 id. 210; *Bowman v. Warhen*, 1 id. 189.

And, in some cases, courts of equity will refuse to interfere or act after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice between the parties, even though the claim may not be barred by the statute of limitations. *Ib.* *Hunt v. Ellison*, 32 Ala. 173; *Wilson v. Anthony*, 19 Ark. 16; *Kerby v. Jacobs*, 13 B. Monr. 435; *Britton v. Lewis*, 8 Rich. Eq. (S. C.) 271.

§ 3. Where both parties are equally in the wrong, the court will not interfere. Courts of equity require honesty, good faith, and legality in transactions between men; and, he who seeks the aid of a court of equity should, himself, come into court with clean hands. In this court, as in courts of law, if both parties are equally in the wrong, the condition of the defendant is the most secure. Where a party seeks to be relieved from the fulfillment of a contract, intentionally made in fraud of the law, and both parties in *pari delicto*, the court will not interfere. It will not aid a judgment debtor to escape from the payment of a judgment upon the ground that the contract on which the action at law was founded was prohibited by a statute, and both parties were in *pari delicto*. *Creath's Admr. v. Sims*, 5 How. (U. S.) 192, 204; *Carey v. Smith*, 11 Ga. 539; *McDonald v. Campbell*, 3 Pittsb. (Pa.) 554.

It is the policy of the law to withhold all aid or relief from parties in controversies between themselves, if they are in *pari delicto*, and when such aid could or might tend to the consummation of an agreement entered into in fraud of the law, or the rights of other persons, unless such interference would promote public policy. *Freeman v. Sedgwick*, 6 Gill. (Md.) 28. Where both parties have been engaged in an illegal transaction, the court will not lend its active aid to the one party to get rid of the securities taken upon the illegal transactions, nor will it aid the other party in retaining them; but will leave both to their

strict technical rights. *Harrington v. Bigelow*, 11 Paige, 349, 350; *Atwood v. Fisk*, 101 Mass. 363. A court of equity will not entertain a suit which is founded upon a contract or transaction involving a violation of the laws of another State within its limits. *Paine v. France*, 26 Md. 46. Or a bill which seeks to cancel an obligation the consideration of which is a violation of chastity, compounding a felony, false-swearing, or other breach of good morals. *Weakly v. Watkins*, 7 Humph. 356. Or a bill to hold an agent responsible for the value of a bond placed in his hands for collection, which, at that time, was known by both parties to have been stolen, although the principal may have originally received it in good faith. *Kirk v. Morrow*, 6 Heisk. (Tenn.) 445. There can be no right in equity which grows out of a transaction that is illegal and void. *Mattox v. Hightstrue*, 39 Ind. 95.

§ 4. Where the equities are equal, the law prevails. It is a maxim in equity, that where the equities of the parties are equal, the law must prevail. Where the defendant has an equal claim to the protection of a court of equity for his title, as that accorded by the court to the plaintiff for the assertion of his title, the court will not interfere on either side. If one of two innocent parties must suffer, it must be that one who trusted most, or whose misplaced confidence caused or permitted the wrong to be done. *Ruiz v. Norton*, 4 Cal. 355; *Coles v. Anderson*, 8 Humph. 489; *Kesler v. Zimmerchitte*, 1 Tex. 50. Equity will not interfere to set up a prior unsealed mortgage against a judgment creditor. *Pratt v. Clemens*, 4 W. Va. 443.

Parties who are clothed with a legal title to an estate will be regarded as its owners, until such title is removed or destroyed by a superior equity. *Lenox v. Notrebe*, 1 Hempst. 475; *Griffin v. Carter*, 5 Ired. Eq. 413; *Hunt v. Turner*, 9 Tex. 385.

A court of equity will not take money from one party and pay it over to others who have no better or more meritorious claim to it than he has. *Claire v. Bailey*, 6 Bush (Ky.), 77, 81. A court of equity will not interfere, either for relief or for discovery, against a *bona fide* purchaser of the legal estate for a valuable consideration, without notice of the adverse title, if he avails himself of the defense at the proper time and in the proper manner. And it will extend its protection equally, if the purchase is originally of an equitable title without notice, and afterward with notice, the party obtains or buys in a prior legal title, for the purpose of supporting his equitable title. *Newton v. Mc-*

Lean, 41 Barb. 285; *Rexford v. Rexford*, 7 Lans. 6; *Beal v. Miller*, 1 Hun, 390; S. C., 3 N. Y. S. C. (T. & C.) 564; *Grosvenor v. Allen*, 9 Paige, 74; *Russell v. Petrie*, 10 B. Monr. 184, 186. But a court of equity is not bound at all times to enforce a strict legal right, but will protect the equitable title when good conscience requires it. *Lewis v. Lyons*, 13 Ill. 117. And it will not impart force to a defective title, when, by doing so, other persons having a prior equity in the land would be injuriously affected. *Lucas v. Barrett*, 1 Greene (Iowa), 510. If the protection of the court cannot be granted to one having a right thereto, without affecting innocent parties, it will be refused. *Johnson v. Hubbell*, 10 N. J. Eq. 332.

§ 5. **Prior in time, prior in right.** As between mere equitable claims, he who is first in time is superior in right. *Cherry v. Monro*, 2 Barb. Ch. 618; *Vanmeter v. McFaddin*, 8 B. Monr. 435, 441. Where the legal estate is outstanding, equitable rights or incumbrances must be upheld or discharged, according to their priority in time. *Wails v. Cooper*, 24 Miss. 208. If the equities are unequal, the preference is given to the superior equity. *Jeremy's Eq. Jur.* 285, 286. If one who is equal in equity, and is also strongest in law, takes a dishonest step to strengthen his title, he will lose his advantage. *Ellis v. Durham*, 2 Jones' Eq. (N. C.) 465. In equity, as well as at law, the maxim is, "*Vigilantibus, non dormientibus, jura subveniunt*," the laws assist those who are vigilant, not those who sleep over their rights. *Slemmer's Appeal*, 58 Penn. St. 168, 177; and see *Broom's Leg. Max.* 892.

§ 6. **Equality is equity.** The general maxim is, that equality is equity; or as it is sometimes expressed, equity delighteth in equality. *Petit v. Smith*, 1 P. Wms. 9. Equality, among creditors having a common right to payment out of a fund provided for the benefit of all, is a settled principle of equity. *Shepherd v. Guernsey*, 9 Paige, 357, 361.

The cases, in which this maxim is most frequently applied in equity, are, in cases of contribution between co-contractors, sureties, and others; to cases of abatement of legacies, where there is a deficiency of assets; to cases of apportionment of moneys due on incumbrances among different purchasers and claimants of different parcels of land; and especially to the marshaling and distribution of equitable assets. 1 *Story's Eq. Jur.*, § 64, *f*.

§ 7. **He who seeks equity must do equity.** The following principles of equity jurisprudence are said to be without exception;

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that whosoever would seek admission into a court of equity must come with clean hands; that such a court will never interfere in opposition to conscience or good faith; and, that it will never be called into activity to remedy the consequence of *laches* or neglect, or the want of reasonable diligence. DANIEL, J., in *Creath's Admr. v. Sims*, 5 How. (U. S.) 204; *Thomas v. Bartow*, 48 N. Y. (3 Sick.) 193. If a borrower of money at a usurious rate of interest seeks the aid of a court of equity for the purpose of canceling the instrument, or for having it delivered up, the court will not interfere in his favor except upon the terms that he pay to the lender such amount as is really, and in good faith due to him. *Sporrer v. Eifler*, 1 Heisk. (Tenn.) 633; *Livingston v. Harris*, 3 Paige, 528, 537; *Fanning v. Dunham*, 5 Johns. Ch. 122. In an action by the grantee to reform a deed of trust given to secure the payment of a note, where the defense of usury is set up and proved, the plaintiff must produce his note and have it reformed so as to rebate the usurious part of it, or no relief will be granted to him. *Corby v. Bean*, 44 Mo. 379, 382. See 1 Story's Eq. Jur., § 64, *e*.

The rule, that he who seeks equity must do equity, does not apply unless the mutual equities arise out of the subject-matter of the suit, and are capable of enforcement. *Finch v. Finch*, 16 Ohio St. 501. But, the rule will be applied where an adverse equity grows out of the controversy before the court, or out of circumstances which the record shows to be a part of its history, or where it is so connected with the cause as to be presented in the pleadings and proofs, with full opportunity afforded to the party thus recriminated, to explain or refute the charges. *Comstock v. Johnson*, 46 N. Y. (1 Sick.) 615.

§ 8. **Equity regards as done, what ought to have been done.** The rule that equity looks upon that as done, which ought to have been done, means that equity will treat the subject-matter, as to collateral consequences, and incidents, in the same manner as though the final acts contemplated by the parties had been executed precisely as they ought to have been; not as the parties might have executed them. *Atwood v. Vincent*, 17 Conn. 575; *Hasbrook v. Paddock*, 1 Barb. 635; *Burch v. Newberry*, *id.* 648; 10 N. Y. (6 Seld.) 374. Though the rule that what ought to have been done will be considered as done between certain parties, the rule will not be extended so as to affect the rights of third parties, as between themselves, when they had contracted in reference to what had been actually done; and especially where the one claiming

the benefit of it was a party to that contract, assented to its terms and received its benefits. *Vose v. Cowdrey*, 49 N. Y. (4 Sick.) 336.

Where real estate is ordered to be sold, it becomes personalty, and will go accordingly. *Fletcher v. Ashburner*, 1 Bro. C. C. 497; 1 Lead. Cas. Eq. 534, and notes.

§ 9. Union of law and equity. In many of the States codes have been adopted which abrogate the distinction between law and equity. See *ante*, 29.

The abrogation of the forms of procedure does not destroy the distinction between legal and equitable rights. *Matthews v. McPherson*, 65 N. C. 189; *Troost v. Davis*, 31 Ind. 34; *ante*, 30.

TITLE IV.

OF SOME OF THE GENERAL PRINCIPLES RELATING TO THE DEFENSE OF ACTIONS AT LAW, OR OF SUITS IN EQUITY.

ARTICLE I.

RULES AND ILLUSTRATIONS.

Section 1. Of defenses in general. When an action or suit has been brought against a party, he must elect whether he will allow a judgment or decree to be taken against him by default, or whether he will make a defense. In considering this matter the first question will be, is there any available defense that can be interposed. In some cases there will be a good defense upon the merits. In other cases there may not be any defense upon the merits, and yet be a sufficient ground for defeating the action because it is brought before the proper time, or is not brought and prosecuted in the proper mode.

As a general rule, the matter constituting a defense must exist and be available at the time the action is brought. *Rundle v. Little*, 6 Q. B. 174; *Lee v. Levy*, 4 B. & C. 399; 6 D. & R. 475; *Bartlett v. Holmes*, 13 C. B. 630. As to novelty as an objection to an action or defense, see *ante*, 140, art. 1, § 2.

No person is allowed to defend an action upon a question which does not concern him, and in which he has no lawful interest. *Flint v. Craig*, 59 Barb. 319, 331, 332; *Campbell v. Erie Railway Co.*, 46 id. 540; *City Bank of New Haven v. Perkins*,

29 N. Y. (2 Tiff.) 554. As an illustration of this rule, infancy is a personal defense, which no person can interpose except the infant himself. *Jones v. Butler*, 30 Barb. 641; 20 How. 189; *Hartness v. Thompson*, 5 Johns. 160; *Slocum v. Hooker*, 13 Barb. 536. So the defense of usury can be set up only by the principal debtor, or by his sureties, heirs, devisees, or personal representatives. *Billington v. Wagoner*, 33 N. Y. (6 Tiff.) 31; *Ohio & Miss. R. R. Co. v. Kasson*, 37 N. Y. (10 Tiff.) 218; 4 Trans. App. 184; *Lehman v. Marshall*, 47 Ala. 362; *Hough v. Horsey*, 36 Md. 181; S. C., 11 Am. Rep. 484; *Carmichael v. Bodfish*, 32 Iowa, 418.

A defense consisting of matter of fact is set up in the plea or answer. If the defense consists of matter of law it is interposed by demurrer to the declaration or complaint. Pleas or answers are generally divided into two kinds; one is those of a *dilatory* nature, which delay the plaintiff's remedy, not by questioning his right of action, but merely the propriety of the action, or the mode in which it is brought; the other is *peremptory*, or those which deny the plaintiff's right of action. The former of these pleas or answers are in *abatement*, the latter in *bar*, of the action.

Before interposing any defense it is sometimes proper, and sometimes necessary to obtain leave of the court for that purpose. See "Leave to Defend."

There are persons who are privileged from civil suits or actions, such as ambassadors, members of congress, of assembly, and some others.

§ 2. **Of pleas or answers in abatement.** Pleas or answers in abatement, when sufficient, show some ground why the action should not be sustained. The usual grounds are such as relate to the disability of the plaintiff, to the disability of the defendant, to the count or declaration, or to the writ. This subject will be fully explained under the title Abatement.

§ 3. **Pleas or answers in bar.** Such pleas are founded upon the principle or fact that the plaintiff has no cause of action. The matters which may be successfully interposed as a defense are very numerous; and they will be found in this work under the title "Defenses," where most of them will be carefully and fully explained.

§ 4. **Demurrer.** One very common mode of defense is by demurrer to the declaration or complaint, when no cause of action is set forth therein, or when it is not sufficiently stated.

The grounds of demurrer will be set forth under the title Demurrer. Such a defense admits the truth of the facts alleged, if they are properly pleaded, and the only question then is, as to their legal sufficiency.

§ 5. **Deny the facts.** Under the common-law system the plea of the general issue put the plaintiff upon proof of the material facts alleged in his declaration; and besides that, there were many defenses which might be proved under this plea. At the present day there are many cases in which a mere general denial operates simply to put the plaintiff upon proof of his case; but do not allow the proof of any defense not affirmatively set up by the defendant in his pleading. See "General Denial."

§ 6. **Admit the facts alleged, but set up matter in avoidance.** When the defendant cannot truly or successfully interpose a denial of the facts alleged in the plaintiff's declaration or complaint, he may either expressly admit their truth, or may impliedly admit them by not denying their truth. In such cases, if the defendant has any valid defense upon the facts it must be set up by way of matter in avoidance of the plaintiff's action.

Such matters are very numerous, and will be found under the proper heads in the part of this work entitled "Defenses."

§ 7. **Counterclaim.** The whole subject of counterclaim as a defense will be discussed elsewhere. See "Counterclaim."

§ 8. **Set-off.** See that title for the law upon the subject.

CHAPTER III.

OF ACTIONS FOUNDED UPON, OR RELATING TO
ACCIDENTS.

ARTICLE I.

ACTIONS AT LAW.

Section 1. When an action lies. An action at law does not lie against a person for causing an injury to another, by an accident wholly unavoidable; but, if any blame be imputable to the defendant, although he be innocent of any intention to injure, as where he drives a spirited horse improperly, or uses imperfect harness, and the horse takes fright and kills another, an action lies. *Wakeman v. Robinson*, 8 Moore, 63; S. C., 1 Bing. 213. It is sufficient if the injury be the direct and immediate consequence of a force exerted by the defendant without the exercise of due care, unless the force was used strictly in self-defense. Thus, where in shooting at butts upon a trial of skill with a bow and arrow, the archer's arrow glanced and struck another, he was held responsible in damages, although he was doing an act lawful in itself, and had no unlawful purpose in view. Year Book, 21 H. 7, 28 a. See *Bullock v. Babcock*, 3 Wend. 391. And the same rule was applied where an unintentional injury was caused by the glancing of a pistol ball, shot at a mark. *Welch v. Durand*, 36 Conn. 182; S. C., 4 Am. R. 55. So, where a number of persons were lawfully exercising themselves at arms, one whose gun accidentally went off, was held liable for the injury occasioned by the accident. *Weaver v. Ward*, Hobart, 134. But, as in all these and similar cases a recovery is properly put on the ground of negligence, a full discussion of them will more appropriately fall under the head of Negligence.

§ 2. **When no action lies.** Where a person, in the performance of a lawful act, causes an injury to the person or property of another, he is not liable, in the absence of all negligence. The general rule is stated to be, that the plaintiff must come prepared with evidence to show that the *intention* was unlawful, or that the defendant was in *fault*; for, if the injury was unavoidable

and the conduct of the defendant was free from blame, he will not be held liable. *Brown v. Kendall*, 6 Cush. 292; *Wakeman v. Robinson*, 1 Bing. 213. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. *Id.*; *Davis v. Saunders*, 2 Chitt. 639; *Vincent v. Stinehour*, 7 Vt. 69; *Strouse v. Whittlesey*, 41 Conn.; S. C., 12 Alb. L. J. 360. Thus, if A sets fire to his own fallow-ground, as he may lawfully do, which communicates to and fires the woodland of B, his neighbor, no action lies against A, unless there was some negligence or misconduct in him or his servant. *Clark v. Foot*, 8 Johns. 422; *Simons v. Monier*, 29 Barb. 419; *Stuart v. Hawley*, 22 id. 619. So, where a person is using fire for any lawful purpose, and is guilty of no negligence, he is not responsible for accidents occurring without fault on his part. *Bizzell v. Booker*, 16 Ark. 308; *Lansing v. Stone*, 37 Barb. 15; *Hinds v. Barton*, 25 N. Y. (11 Smith) 544; *Cook v. The Champlain Transportation Co.*, 1 Denio, 91. And if any one driving along a highway with due care, accidentally injures another person or his property, he is not liable in the absence of negligence. *Hammock v. White*, 11 C. B. (N. S.) 587; *Center v. Finney*, 17 Barb. 94; *Brown v. Collins*, 53 N. H. 442; S. C., 16 Am. Rep. 372; *Holmes v. Mather*, L. R., 10 Exch. 261; S. C., 16 Am. Rep. 384, *n.* So, the owner of property, which, without his consent, is carried by flood or storm down a stream, and deposited upon the lands of another, is not liable for any damage occasioned, unless he reclaims the property. *Sheldon v. Sherman*, 42 N. Y. (3 Hand) 484; S. C., 1 Am. Rep. 569; *Livezey v. Philadelphia*, 64 Penn. St. 106; S. C., 3 Am. Rep. 578. Nor is the owner of a steam boiler, which is operated upon his own premises in a lawful manner, liable, without proof of negligence, to an adjoining owner, for damage done to his property by reason of an accidental explosion of such boiler. *Losee v. Buchanan*, 51 N. Y. (6 Sick.) 476; S. C., 10 Am. Rep. 476. And where one builds a mill-dam upon a proper model, and the work is well and substantially done, he is not liable to an action, though it break away, in consequence of which his neighbor's dam and mill below are destroyed. Negligence should be shown in order to make him liable. *Ib.* *Livingston v. Adams*, 8 Cow. 175; *Sheldon v. Sherman*, 42 N. Y. (3 Hand) 484; S. C., 1 Am. Rep. 579; see *Wilson v. City of New Bedford*, 108 Mass. 261; S. C., 11 Am. Rep. 352; *Cahill v. Eastman*, 18 Minn. 324; S. C., 10 Am. Rep. 184; *Rylands v. Fletcher*, Law Rep., 3 H. L. 330; 11 Alb. Law

Jour. 233. In these, and in many like cases, the injury arises from a fortuitous occurrence beyond the control of man, termed "the act of God;" and the party suffering must submit to it, as a providential dispensation. *Anthony v. Haney*, 8 Bing. 191; *Ryan v. N. Y. Cent. R. R. Co.*, 35 N. Y. (8 Tiff.) 210; *Gault v. Humes*, 20 Md. 297; *Vincent v. Stinehour*, 7 Vt. 62. There is no liability on the part of him through whose innocent instrumentality the injury occurs, and his promise to respond in damages would be without consideration and void. *Sheldon v. Sherman*, 42 N. Y. (3 Hand) 484; S. C., 1 Am. Rep. 569. See this subject more fully discussed under "Act of God," as a defense to actions.

ARTICLE II.

ACTIONS IN EQUITY, AND WHEN AN ACTION LIES.

Section 1. In general. In many cases of accident, relief may be obtained in an equitable action, and the term *accident*, in the view of a court of equity, means not merely inevitable casualty, or the act of providence, or what is technically called *vis major*, or irresistible force; but such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct in the party. 1 Story's Eq. Juris., § 78; *Brown v. Elliott*, 14 N. J. L. 353; *Chase v. Barrett*, 4 Paige, 148; *Jones v. Woodhull*, 1 Root (Conn.), 298. The jurisdiction of the court, arising from accident in this sense, is of very ancient origin, and probably coeval with the existence of equity itself as a distinct branch of jurisprudence. See *Armitage v. Wadsworth*, 1 Madd. 189, 193; *East India Company v. Boddam*, 9 Ves. 466. So, accident was a circumstance on which relief might be obtained under the Roman system of jurisprudence, on the ground of natural justice. Dig. XXVII, 1, 1, 13, 7; 1 Spence's Eq. Juris. 626.

It is not, however, every case of accident which will justify the interposition of a court of equity. *Whitfield v. Faussat*, 1 Ves. 392, 393. The jurisdiction being concurrent, will be maintained in those cases only in which there is not a plain, adequate and complete remedy at law, and the party has a conscientious title to relief. Both these grounds must concur in the given case; otherwise, a court of equity is bound to withhold its aid. See 1 Story's Eq. Juris., § 79; *Grant v. Quick*, 5 Sandf. (N. Y.) 612; *Tucker v. Madden*, 44 Me. 206; *Keen v. Jordon*, 13 Fla. 327. And

since courts of law, in modern times, frequently interfere to grant a remedy under circumstances in which it would have been formerly denied, and as, by express legislative enactments, such courts have, in some cases, had conferred upon them the same remedial faculty which belongs to courts of equity, it has resulted that accident now rarely forms a satisfactory reason for equitable interference. See 1 Story's Eq. Juris., § 80; 3 Broom & Had. Com. 61 (Wait's ed., vol. 2, 64.) In most cases, where the jurisdiction is still allowed to exist, it is merely because, having been once acquired, it cannot be afterward lost or abandoned. *Id.*; and see *Hall v. Hall*, 43 Ala. 488; *King v. Baldwin*, 17 Johns. 384; *East India Company v. Boddam*, 9 Ves. 466; *Mayne v. Griswold*, 3 Sandf. (N. Y.) 463. Where courts of equity originally obtained and exercised jurisdiction, that jurisdiction is not overturned or impaired by the fact that courts of law have subsequently granted a remedy in similar cases. *Case v. Fishback*, 10 B. Monr. (Ky.) 40; *Shields v. Cone*, 4 Rand. (Va.) 541.

§ 2. *Lost instruments under seal.* The jurisdiction in equity, in the case of lost bonds, or other instruments under seal, is founded upon a doctrine of the ancient common law, that no remedy existed in a court of law in such case, because there could be no *profert* of the instrument, without which the declaration would be fatally defective. *East India Company v. Boddam*, 9 Ves. 464; *Bromley v. Holland*, 7 id. 19; *Toulmin v. Price*, 5 id. 238, and notes; *Atkinson v. Leonard*, 3 Bro. Ch. 218. In modern times, *profert* may, however, be dispensed with, if an allegation of loss, by time and accident, is stated in the declaration, and thus, courts of law may now entertain jurisdiction. But it does not follow, because a court of law will give relief, that a court of equity loses the concurrent jurisdiction which it has always had. *Mayne v. Griswold*, 3 Sandf. (N. Y.) 478; 1 Story's Eq. Juris., § 80; *Shields v. Com.*, 4 Rand. (Va.) 541. The latter court still retains its jurisdiction, and in the case of lost or destroyed bonds, etc., affords relief more complete, adequate, and perfect, than can be done by courts of law. *Allen v. State Bank*, 1 Dev. & B. Eq. (N. C.) 1; *Irwin v. Planters' Bank*, 1 Humph. 145; *Deans v. Dortch*, 5 Ired. Eq. (N. C.) 331; *Carter v. Jones*, 5 id. 196. Thus a court of law, in the absence of a statutory authority, is generally incompetent to require as terms of granting *relief*, that the party shall give, when proper, a suitable bond of indemnity; but this, a court of equity may do, and will also require the party to make an affi-

davit of the loss of the instrument. *Leroy v. Veeder*, 1 Johns. Cas. 417; *Walmsley v. Child*, 1 Ves. 344. See *Owen v. Paul*, 16 Ala. 130; *Hill v. Lackey*, 4 Dana, 81; *Chewing v. Singleton*, 2 Hill's Eq. (S. C.) 371; *Bennington v. The Governor*, 1 Blackf. (Ind.) 78; *Davis v. Pettit*, 11 Ark. 349. As to analogous relief in a court of law, by requiring the previous offer of a bond of indemnity, see *Fales v. Russell*, 16 Pick. 315; *Hansard v. Robinson*, 7 B. & C. 90; *Tuttle v. Standish*, 4 Allen, 481; *Smith v. Rockwell*, 2 Hill (N. Y.), 482. A court of equity will not grant relief to an obligee in the case of a lost bond, where it has been destroyed or suppressed by the obligee himself. *Davis v. Davis*, 6 Ired. Eq. (N. C.) 418. And see *Blade v. Noland*, 12 Wend. 173.

The loss of a deed is not always a ground to come into a court of equity for relief; for, if there is no more in the case, although the party may be entitled to a *discovery* of the original existence and validity of the deed, courts of law may afford just relief, since they will admit evidence of the loss and of the contents of a deed, just as a court of equity will do. *Whitfield v. Faus-sat*, 1 Ves. 392, 393. See *Donaldson v. Williams*, 50 Mo. 407; *Thomas v. Coldwell*, 50 Ill. 138. Therefore, to enable a party to come into equity for relief, in case of a lost deed, it is incumbent upon him to establish, that either there is no remedy at all at law, or no remedy which is adequate, and adapted to the circumstances of the case. See 1 Story's Eq. Juris., § 84; *Worthy v. Tate*, 44 Ga. 152; *Dormer v. Fortescue*, 3 Atk. 192; *Dalton v. Coatsworth*, 1 P. Wms. 731. Where relief is sought in the case of a lost deed concerning the title to lands, an affidavit of the loss must be annexed to the bill. *Carlisle v. Ramsey*, 4 Ind. 242.

On proof of the loss of a mortgage deed of land to secure personal support, a court of equity will decree a new mortgage to be made. *Lawrence v. Lawrence*, 42 N. H. 109; but see *Hoddy v. Hoard*, 2 Cart. (Ind.) 474; and it has been held, that where a deed containing an error reformable in equity is lost, the execution of a new and correct deed may be decreed. *Hudspeth v. Thomaston*, 46 Ala. 470. So, where an unrecorded deed has been lost, and the evidence introduced shows transactions between the parties to the deed tending strongly to establish a conveyance, and such evidence is uncontradicted, and its force is not rebutted or destroyed, a court of equity will presume that a deed was executed and delivered, and will protect the rights of the grantee. *Schaumburg v. Hepburn*, 39 Mo. 125.

§ 3. **Lost notes, negotiable.** A general principle applicable to negotiable instruments is, that the party to such an instrument, when he is called upon to pay it, has the right to insist that it shall be produced and delivered up to him. As the owner, however, in case of loss of the instrument, cannot do this, the courts allow a recovery upon the terms of his giving proper indemnity. But a court of common law cannot require such indemnity as a part of its judgment. It can neither impose terms upon the plaintiff as a condition of such judgment, nor prevent the issuing of an execution thereon. *Pierson v. Hutchison*, 2 Camp. 211; *Aranguren v. Scholfield*, 1 Exch. 494; 38 Eng. Law & Eq. 424; *Greenway, ex parte*, 6 Ves. 862. The only remedy in such cases is in a court of equity, where all the circumstances of the loss can be fully investigated, and a suitable and proper indemnity provided. *Davies v. Dodd*, 4 Price, 176; S. C., 1 Wils. Exch. 110; *Walmsley v. Child*, 1 Ves. 344; *Mossop v. Eadon*, 16 id. 430; *Hansard v. Robinson*, 7 B. & C. 90; *Clay v. Crowe*, 8 Exch. 294; *Crowe v. Clay*, 9 id. 604. Such is the firmly established doctrine in England, and in this country the weight of authority is in harmony with the English rule. See *Savannah National Bank v. Haskins*, 101 Mass. 370; S. C., 3 Am. Rep. 373; *Moses v. Trice*, 21 Gratt. (Va.) 556; S. C., 8 Am. Rep. 609; *Wright v. Wright*, 54 N. Y. (9 Sick.) 437; *Tuttle v. Standish*, 4 Allen, 482. In all cases where, by the accidental loss of the note or bill, the plaintiff cannot comply with the defendant's right under his contract to have the identical instrument surrendered, and it is within the power of the court to secure the defendant from all appreciable injury, relief will be decreed to the plaintiff in equity, upon terms and conditions which will secure and protect the rights of all. And it is held to make no difference in principle whether the defendant's contract is an acceptance or only a promise to accept. *Savannah National Bank v. Haskins*, 101 Mass. 370; S. C., 3 Am. Rep. 373.

In some of the States statutory remedies have been provided, by which most of the difficulties standing in the way of actions at law have been removed. See as to New York, 2 R. S. 406, §§ 75, 76; *Wright v. Wright*, 54 N. Y. (9 Sick.) 437; Alabama, *Posey v. Decatur Bank*, 12 Ala. 802; *Branch Bank at Mobile v. Tillman*, 12 id. 214; Louisiana, *Nagel v. Mignot*, 7 Mart. 657; 8 id. 488; Iowa, *Temple v. Gove*, 8 Iowa, 511; Michigan, *Higgins v. Watson*, 1 Mich. 428; Georgia, *Banks v. Dixon*, 24 Ga. 483; Tennessee, *Union Bank v. Osborne*, 6 Humph. 318. But, inde-

pendently of the statute, an action at law is permitted in Tennessee on any lost note or bill. *Union Bank v. Warren*, 4 Sneed, 167. As to Mississippi, see *Clark v. Reed*, 12 Smedes & M. 554; Kentucky, *Sebree v. Dorr*, 9 Wheat. 558; *Scott v. Cleveland*, 3 T. B. Monr. 62; *Commercial Bank v. Benedict*, 18 id. 307; Virginia, *Shields v. Commonwealth*, 4 Rand. 541; *Farmers' Bank of Virginia v. Reynolds*, id. 186. It may be remarked generally of these statutory provisions, that they secure the action at law upon lost negotiable paper, upon tendering a bond of indemnity, and after parol proof of the contents. In other States having common-law and equitable powers blended in the same courts, it is the constant practice of those courts to assume jurisdiction in this class of cases. Thus, in Pennsylvania, it is held that the failure to indemnify is not a defense in bar of the action, but is merely a prerequisite to the issuing of an execution to enforce the judgment, and the right to restrain such execution is an equitable power vested in the courts, to be administered with the machinery of common-law forms. *Bisbing v. Graham*, 14 Penn. St. 14. And see *Fales v. Russell*, 16 Pick. (Mass.) 315; *Bean v. Keen*, 7 Blackf. (Ind.) 152; *Doornady v. State Bank of Illinois*, 2 Scam. 236; *Welton v. Adams*, 4 Cal. 37; *Bell v. Moore*, 9 Ala. 823; *Bullet v. Bank of Pennsylvania*, 2 Wash. C. C. 172. These principles have, however, no application in those States where the common-law and the equity tribunals are separate and distinct. In such case the courts of common law steadily refuse to take jurisdiction of suits upon lost negotiable instruments. See *Thayer v. King*, 15 Ohio, 242; *Rowley v. Ball*, 3 Cow. 303; *Kirby v. Sisson*, 2 Wend. 550; *Wardlaw v. Gray*, Dudley's Eq. (S. C.) 85; *Moses v. Trice*, 21 Gratt. (Va.) 556; S. C., 8 Am. Rep. 609. There is, however, no absolute necessity of resorting to a court of equity, as the law now stands, except in the case of *negotiable instruments, negotiated while current*, courts of law now allowing a recovery at law, upon lost instruments in all other cases. See *Moore v. Fall*, 42 Me. 450; *Torrey v. Foss*, 40 id. 74; *Hough v. Barton*, 20 Vt. 455; *Hopkins v. Adams*, id. 407; *Wright v. Wright*, 54 N. Y. (6 Sick.) 437; 1 Story's Eq. Juris., § 86 a. In cases of this kind, a bond of indemnity is never necessary, except in those cases in which the note alleged to be lost is *negotiable*: and the negotiability will not be presumed, but must be proved. *Blade v. Noland*, 12 Wend. 173; *Wright v. Wright*, 54 N. Y. (9 Sick.) 437. The American rule upon indemnity is briefly stated to be

"that if it can be shown in any way that the defendant may be wrongfully injured by paying, he may require security, but only then." 2 Pars. on Bills & Notes, 304.

To sustain an equitable action for relief, in the cases of supposed lost instruments, an affidavit of the loss of the instrument, and that it is not in the possession or power of the plaintiff, is required. *East India Co. v. Boddam*, 9 Ves. 466; *Leroy v. Veeder*, 1 Johns. Cas. 417; *Pennington v. The Governor*, 1 Blackf. (Ind.) 78. But, if the proof of the loss is clear, the affidavit thereof may be dispensed with. *Graham v. Hackwith*, 1 A. K. Marsh. (Ky.) 424. So, the rule, as to the necessity of an affidavit, is held to apply in those cases only, where, if the instrument had not been lost, the remedy of the party would have been at law, and not in equity. *Purviance v. Holt*, 3 Gilm. (Ill.) 395. The finding of the lost instrument after the institution of a suit for the recovery of its amount, does not oust the court of jurisdiction. *Crawford v. Summers*, 3 J. J. Marsh. (Ky.) 300; *Hamlin v. Hamlin*, 3 Jones' Eq. (N. C.) 191; *Miller v. Wells*, 5 Mo. 6. Where it is shown that the plaintiff voluntarily burned or destroyed the note, inferior or secondary evidence of the contents of the note will not be received in evidence. *Blade v. NoLand*, 12 Wend. 173.

§ 4. Forfeitures. From a very early period, courts of equity have granted relief against penalties and forfeitures in certain cases. Thus, where one who was bound in an obligation to pay money, paid it and took no acquittance, or took an acquittance without seal, or "the money was paid within a short time after the day," if judgment was had in any of these cases at law, the court of chancery would give relief. This jurisdiction was afterward extended to cases where the default was of a trifling nature, irrespective of accident, or apparently of any excuse, as when all the debt had been paid but a small amount, and that had been tendered. See 1 Spence's Eq. Juris. 629; *Underwood v. Swan*, Car. 1; 1 Rep. Ch. 86. Finally, the jurisdiction of the court was so enlarged as to embrace all cases where relief was sought against the penalty of a bond, and was also made to include the case of mortgages, where courts of equity constantly allow a redemption, notwithstanding a forfeiture at law. *Len-non v. Napper*, 2 Sch. & Lefr. 684, 685; *Seton v. Slade*, 7 Ves. 273, 274; 1 Story's Eq. Juris., § 89. See *Bostwick v. Stiles*, 35 Conn. 195; *Crane v. Hancks*, 1 Root (Conn.), 468; *Doty v. Whittlesey*, id. 310. So, on the other hand, where the vendor

reserved a lien "to be enforced within six years or stand for nought thereafter," and he was prevented by the occurrence of the civil war, from enforcing the lien within the time, he was granted relief in equity. *Atkins v. Rison*, 25 Ark. 138. A court of equity never lends its aid to enforce a forfeiture. *Warner v. Bennett*, 31 Conn. 468; *Smith v. Jewett*, 40 N. H. 530. But a condition in a mortgage, that upon default in the payment of interest for a specified number of days "after the time limited for the payment thereof, the principal sum, together with all arrears of interest, shall, at the option of the mortgagee, become and be due and payable immediately," is not in the nature of a forfeiture, to be relieved against by a court of equity. It is an agreement which the parties have a right to make, and the extension of credit is lawfully made dependent upon the punctual payment of interest. Upon the failure of the mortgagor to perform the condition, the principal becomes due and payable, by the terms of his contract, and, in the absence of fraud, this, like any other contract, will be enforced by a court of equity. *Ferris v. Ferris*, 16 How. (N. Y.) 102; *Valentine v. Van Wagner*, 37 Barb. 60; *Rubens v. Prindle*, 44 id. 336; *Noyes v. Clark*, 7 Paige, 179. See *Malcolm v. Allen*, 49 N. Y. (4 Sick.) 448. Equitable relief, in cases of penalties and forfeitures, is said to be limited to such cases as admit of compensation, according to the original intent of the parties. *Giles v. Austin*, 46 How. (N. Y.) 269.

§ 5. **Executors and administrators, errors in payments, etc.** There are many cases in which a party sustains a loss or injury, while acting in entire good faith, and without negligence, and yet the law affords him no relief. Thus, executors and administrators often pay debts and legacies in the course of administration, relying in entire confidence upon a sufficiency of assets for all purposes, and it turns out from unexpected occurrences, that there is a deficiency of assets. There may be no relief at law in such a case, but they will be entitled to it in a court of equity, upon the ground, that, otherwise, they will be innocently subjected to an unjust loss, from what the law itself deems an accident. *Johnson v. Johnson*, 3 Bos. & Pul. 162, 169; 1 Story's Eq. Juris., § 90. But, to found a good title to relief in equity, it is indispensable that there should have been no negligence or misconduct on the part of such executors or administrators in the payment of the assets. *Ib.* See *Brooking v. Jennings*, 1 Mod. 174; *Brisbane v. Dacres*, 5 Taunt. 143, 159.

Another case in which an executor or administrator would be entitled to equitable relief, is where he receives money, supposed to be due from a debtor to the estate, and pays it away to his testator's creditors, but it turns out that the debt had been paid in the testator's life-time. The supposed debtor may recover back the money in equity from the executor, and the latter may in like manner recover it back from the creditors. *Pooley v. Ray*, 1 P. Wms. 355. So, if an executor pays one legatee, and there is afterward a deficiency of assets to pay the others, a court of equity will interpose to compel the legatee, so paid, to refund a proportional part of what he has received; unless the deficiency of assets has been occasioned by the *waste* of the executor, in which case, the legatee who is paid may retain the advantage gained by his superior diligence. *Orr v. Kaines*, 2 Ves. 194; *Anonymous*, 1 P. Wms. 495; *Lupton v. Lupton*, 2 Johns. Ch. 614, 626. But this rule does not apply where a *creditor*, instead of a legatee, is in question. The latter is always compellable to refund in favor of the former. *Ib.* *Noel v. Robinson*, 1 Vern. 90, 94. In Massachusetts, an executor, who has voluntarily paid a legatee, can, on a subsequent discovery of a deficiency of assets, recover back the money at law. So, if he has paid some creditors in full, on the supposition of a sufficiency of assets, and it afterward turns out that there is a deficiency of assets, he may recover back from the creditors so paid, in proportion to the deficiency. *Heard v. Drake*, 4 Gray, 514; *Walker v. Hill*, 17 Mass. 380; *Bliss v. Lee*, 17 Pick. 83; *Walker v. Bradley*, 3 id. 261; 1 Story's Eq. Juris., § 92, *n.*; see *Riddle v. Mandeville*, 5 Cranch (U. S.), 329.

§ 6. **Execution of powers.** As it regards the defective execution of powers, resulting from accident, courts of equity will interfere to grant relief in favor of persons, in a moral sense entitled to the same, where there are no opposing equities on the other side. Thus, in the absence of any countervailing equity, the execution of a power will be established in favor of creditors. *Dennison v. Goehring*, 7 Penn. St. 175. Or a purchaser. *Schenck v. Ellingwood*, 3 Edw. Ch. 175. Or to provide for the support of a wife or children, or a charity; but relief will not be granted in favor of the donee of the power, or a husband or grandchildren. *Porter v. Turner*, 3 Serg. & Rawle, 108. Or remote relations, or strangers generally. 1 Story's Eq. Juris., § 95; 3 Broom & Had. Com. 61 (Wait's ed., vol. 2, 65). And where the power is specially created by statute, whatever formalities are

required must be strictly complied with or the defect may not be helped in equity. *Smith v. Bowes*, 38 Md. 463. See *Gridley's Heirs v. Phillips*, 5 Kan. 349; *Stewart v. Stokes*, 33 Ala. 494; 1 Story's Eq. Juris., § 96. So, when nothing has been done, or attempted to be done, toward the execution of a power, equity, in general, will not interfere, unless the instrument creating the power shall have vested, or recognized, in third persons, rights to secure which the execution of the power is necessary. *Barr v. Hatch*, 3 Ohio, 527. And, generally, defects which are of the very essence or substance of the power will not be aided in equity; as where it is required to be executed by *will*, and it is executed by an irrevocable and absolute *deed*. But defects which are not of the very essence or substance of the power may generally be remedied. Thus, a defect which arises from executing the power by a *will*, when it is required to be by a deed, or other instrument *inter vivos*, will be aided. 1 Story's Eq. Juris., § 97; and see 3 Broom & Had. Com. 61 (Wait's ed., vol. 2, 65). And relief is given in cases where deeds are, by mistake, sealed and delivered in the name of the attorney, instead of the principal, on the ground of aiding a defective execution of powers. *Kearney v. Vaughan*, 50 Mo. 284; *Salman v. Hoffman*, 2 Cal. 142; 1 Am. Lead. Cas. 608. So the non-execution of a sheriff's deed, by reason of death, has been relieved against. *Stewart v. Stokes*, 33 Ala. 494. But equity has never ventured to correct a defective execution of a will, the mode of executing that particular instrument being one to which the legislature has paid especial attention; and though through the accidental ignorance of an intending testator, he may fail to carry out his intention, this is an irremediable accident, and rightly so, for reasons sufficiently obvious. 3 Broom & Had. Com. 61 (Wait's ed., vol. 2, 65).

The cases of most common occurrence, in which equity will always interfere and grant suitable relief, are those where the power is accompanied with a trust. The principle running through all the cases is stated to be, "that if the power is one which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of his power, and without discretion whether he will exercise it or not; and the court adopts the principle relative to trusts, and will not permit his negligence, accident, or other circumstances, to disappoint the interest of those for whose benefit he is called upon to exe-

cute it." Lord ELDON, in *Brown v. Higgs*, 8 Ves. 574; and see *Withers v. Yeadon*, 1 Rich. (S. C.) Eq. 325; *Gibbs v. Marsh*, 2 Metc. (Mass.) 243; *Osgood v. Franklin*, 2 Johns. Ch. 1; S. C. affirmed, 14 Johns. 527.

§ 7. **Transfer of bills and notes.** Relief will also be granted in equity, where, upon a transfer of a bill of exchange, or a promissory note, there has been an accidental omission by the party to indorse it according to the intention of the transfer. The party, if living, otherwise, his executor or administrator, may be compelled in equity to make the indorsement, and if the party has since become bankrupt, or his estate is insolvent, his assignees will be compelled to make it. The transaction amounts to an equitable assignment, and a court of equity will clothe it with a legal effect and title. *Watkins v. Maule*, 2 Jac. & Walk. 242; 1 Story's Eq. Juris., § 99, b.

ARTICLE III.

WHEN NO ACTION LIES.

Section 1. Accident preventing fulfillment of contract. A distinction under this head has been thus stated in a leading case: "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and he hath no remedy over, there the law will excuse him; as in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. But when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract. And, therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it." *Paradine v. Jane*, Aleyn, 26, 27. There is no ground for the interference of equity in such a case. See *Thompkins v. Dudley*, 25 N. Y. (11 Smith) 272; *Dexter v. Norton*, 47 id. (2 Sick.) 62; S. C., 7 Am. R. 415; *School Trustees v. Bennett*, 3 Dutch. (N. J.) 515. The fact that performance of a contract is rendered more burdensome and expensive, by a law enacted after it is entered into, does not exonerate a party from its obligations. *Baker v. Johnson*, 42 N. Y. (3 Hand) 126. See this subject discussed at length under head of Performance.

§ 2. **Covenant to pay rent.** Where there is an express cove-

nant to pay rent, the party must perform the covenant, although the premises are accidentally destroyed by fire during the term. It is a calamity to be borne by both parties. The tenant and the landlord suffer according to their proportions of interest in the property burnt; the tenant during the term, and the landlord for the residue. See, generally, 1 Story's Eq. Juris., § 102; *Fowler v. Bott*, 6 Mass. 63; *Hallett v. Wylie*, 3 Johns. 44; *McKecknie v. Sterling*, 48 Barb. 330; *Brewer v. Herbert*, 30 Md. 301; *Dexter v. Norton*, 47 N. Y. (2 Sick.) 62; S. C., 7 Am. R. 415; *Suydam v. Jackson*, 54 N. Y. (9 Sick.) 450; *Truesdell v. Booth*, 4 Hun (N. Y.), 100; S. C., 6 N. Y. S. C. (T. & C.) 379.

§ 3. **Negligence of party.** A party seeking relief in equity, must show a title to relief unmixed with any gross misconduct or negligence of himself or his agents. Courts of equity, therefore, deny relief to a party upon the ground of accident, if the accident has resulted from his own gross negligence. The general rule is, that if a party becomes remediless at law by negligence, he shall not be relieved in equity. *Penny v. Martin*, 4 Johns. Ch. 569; *Mar. Ins. Co. v. Hodgson*, 7 Cranch (U.S.), 336.

§ 4. **Equal equities.** So, courts of equity afford no relief on the ground of accident, where the other party is entitled to equal protection. The maxim is, that "between equal equities the law will prevail." See Adams' Eq. 148; *Landon v. Platt*, 34 Conn. 524; *Gregory v. Savage*, 32 id. 261.

§ 5. **Bona fide purchaser.** Equity will not interfere on the ground of accident, against a *bona fide* purchaser of the legal title for a valuable consideration and without notice, in favor of one who has but an equitable title. In the view of a court of equity, the former is as much entitled to assistance and protection as the latter. See *Bush v. Golden*, 17 Conn. 602; 1 Story's Eq. Juris., § 108.

CHAPTER IV.

OF ACTIONS RELATING TO, OR FOUNDED UPON, AN ACCOUNTING.

ARTICLE I.

ACTION OF ACCOUNT AT LAW.

Section 1. When the action lies. Account is a very ancient form of action at the common law, and all the authorities agree in representing it to be one of the most difficult, dilatory and expensive actions that ever existed. It has long since given place to other remedies both in England and the United States, and may now be regarded as obsolete. In some of the States, however, the action is in use in a modified form, to supply defects in their system which arise from the want of a court of equity. See *Duncan v. Lyon*, 3 Johns. Ch. 351; *Couscher v. Tuolan*, 4 Wash. 442; *Griffith v. Willing*, 3 Binn. (Penn.) 317; *Stewart v. Kerr*, 1 Morr. (Iowa) 240; *McMurray v. Rawson*, 3 Hill (N. Y.), 59; *Munroe v. Luke*, 1 Metc. (Mass.) 464. At common law, the action of account would lie against guardians in socage, bailiffs and receivers; and, in favor of trade, by one merchant against another. By statute, as in New York and Virginia, it would lie against a joint tenant or tenant in common of real estate for receiving more than his just share and proportion. See *McMurray v. Rawson*, 3 Hill, 59; 3 Rob. Pr. 411; *Appleby v. Brown*, 24 N. Y. (10 Smith) 143; S. C., 23 How. 207.

§ 2. **When the action does not lie.** By the old common law, account did not lie for one tenant in common against his co-tenant, unless the latter had taken all the profits of the land; nor by a joint tenant against his companion, unless the latter had received all the profits for the common benefit of both, and not for his own use merely. Archb. N. P. 292. Nor could the action be brought by an executor or administrator, nor against an executor, administrator, or infant (Ib. See *Appleby v. Brown*, 24 N. Y. [10 Smith] 143); and it would only lie between *two* merchants, and not where the partnership consisted of a larger number. Ib.; *Portsmouth v. Donaldson*, 32 Penn. St 202; *Duryea v. Whitcomb*, 31 Vt. 395.

However, it is found by experience that the most ready and effectual way to settle these matters of account is in a court of equity; and the remedy by action of account has been very generally supplanted by the more beneficial powers of such a court, whereby not only the production of papers and an account can be compelled, but also an answer on oath can be required and a decree had for the sum due from the defendant. See 3 Bl. Com. 162, 163; *Taff Vale R. C. v. Nixon*, 1 H. L. Cas. 111; *Neal v. Keel's Executors*, 4 T. B. Monr. (Ky.) 162; *Attorney-General v. Mayor, etc., of Dublin*, 1 Bligh (N. S.), 336.

ARTICLE II.

ACTIONS OF ACCOUNT IN EQUITY.

Section 1. In general. Courts of equity began to assume jurisdiction in matters of account at a very early period; and they have for a great length of time exercised a general jurisdiction not only in all cases of mutual accounts, but have extended the remedy to a vast variety of cases to which the remedy at law never was applicable. No precise rule can be laid down on the subject, but it may be stated generally, that in all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity over accounts is undoubted. But in transactions not of this peculiar character, great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction. *Boher v. Biddle*, Baldw. C. C. 394; *Seymour v. Long Dock Co.*, 20 N. J. Eq. 396; *Lafever v. Bellmyer*, 5 W. Va. 33; *Gloninger v. Hazard*, 42 Penn. St. 389; *Cummins v. White*, 5 Blackf. (Ind.) 356; *Smith v. Leveaux*, 2 De G., J. & S. 1; *Fowle v. Lawrason*, 5 Pet. (U. S.) 495.

§ 2. **No remedy at law.** Jurisdiction in equity, in cases of account, has been placed by Mr. Justice BLACKSTONE upon the sole ground of the right of the courts of equity to compel a discovery. 3 Black. Comm. 437, 439. But this, although admitted to be a strong ground of jurisdiction, is not in modern times regarded as the sole ground. Chancery has jurisdiction of matters of account, notwithstanding no discovery is required. *Ludlow v. Simond*, 2 Caines (N. Y.), 1; and this jurisdiction is founded upon the consideration, that the remedy in equity, in

cases of account, is generally more complete and adequate than it is or can be at law. *Ib.* *Duncan v. Lyon*, 3 Johns. Ch. 361; *Rathbone v. Warren*, 10 Johns. 595; *McLaren v. Steapp*, 1 Ga. 376; *Walker v. Cheever*, 35 N. H. 339; *Watt v. Conger*, 21 Miss. 412; *White v. Hampton*, 10 Iowa, 238; *Scruggs v. Luster*, 1 Heisk. (Tenn.) 150. So, it is the well-established American doctrine, that where equity obtains jurisdiction of a cause for any purpose, it will generally retain it, until complete justice is effected. *Corby v. Bean*, 44 Mo. 379; *Peoria v. Johnson*, 56 Ill. 45; *Boyd v. Hunter*, 44 Ala. 705; *Day v. Cummings*, 19 Vt. 496; *Traip v. Gould*, 15 Me. 82; *Lafever v. Bellmyer*, 5 W. Va. 33; *DeBemer v. Drew*, 39 How. (N. Y.) 466; 57 Barb. 438; *Rathbone v. Warren*, 10 Johns. 595. But this maxim is properly applicable, only where the court obtains legitimate jurisdiction of the cause, and for some reason, affecting the cause, or some portion of it. Thus, if proper application is made to a court of equity for an injunction, to restrain the infringement of a patent, the court will retain the cause, and will settle other matters between the parties, inseparably connected with the infringement, but which do not constitute ground for original equitable jurisdiction. *Brooks v. Stolley*, 3 McLean (C. C.), 523. So, where application is made in equity by one partner, to restrain his copartners from violating partnership articles, the cause will be retained, and other matters disposed of, not strictly of equitable cognizance. See 1 Story's Eq. Juris., § 74, *b*; *Green v. Spring*, 43 Ill. 280; *Daniel v. Green*, 42 id. 472; *DeBemer v. Drew*, 39 How. (N. Y.) 466; 57 Barb. 438. If, however, the object of the party in coming into equity is general discovery *merely*, it gives the court no jurisdiction of the cause. 1 Story's Eq. Juris., § 74, *c*; see *Fowle v. Lawrason*, 5 Pet. (U. S.) 495; *Stacy v. Pearson*, 3 Rich. Eq. (S. C.) 148; *Lyons v. Miller*, 6 Gratt. (Va.) 427, 438; *Mitchell v. Greene*, 10 Metc. (Mass.) 101; *Pease v. Pease*, 8 id. 395.

§ 3. **Mutual accounts.** Courts of equity exercise a general jurisdiction in all cases of mutual accounts, and *a fortiori*, when complicated, and this upon the ground of the inadequacy of the remedy at law. *Ludlow v. Simond*, 2 Cai. Cas. (N. Y.) 1, 38, 52; *Lafever v. Bellmyer*, 5 W. Va. 33; *Gloninger v. Hazard*, 42 Penn. St. 389. So, such courts also entertain jurisdiction, when the accounts to be examined are on one side only, and a discovery is wanted in aid of the account, and is obtained. *Ib.* See *Oil Co. v. Adams*, 6 Phila. (Penn.) 182; *Pearl v. Nashville*, 10 Yerg. (Tenn.) 179. But where the accounts are all on one side, and no

discovery is sought or required, the jurisdiction will not be maintainable. *Walker v. Cheever*, 25 N. H. 339. See *McMartin v. Bingham*, 27 Iowa, 234; *Haywood v. Hutchins*, 65 N. C. 574.

In illustration of the general principles here stated, it has been held that a court of equity may properly entertain jurisdiction where there has been a running account for many years between the parties, consisting of numerous items, notwithstanding *assumpsit* would also lie. *Hickman v. Stout*, 2 Leigh (Va.), 6. And where the accounts between the clerk and marshal of a federal court had continued for a long time, until they became complicated, it was held, that chancery would take jurisdiction to enforce a settlement of the account, though there might have been originally, and still, a remedy at law. *Hay v. Marshall*, 3 Humph. (Tenn.) 623; and see *Kirkman v. Vaulier*, 7 Ala. 217. So, a series of consignments on one side, and of payments on the other, constitutes an account which may be settled by suit in equity. *McLin v. McNamara*, 2 Dev. & B. Eq. (N. C.) 82; and where a plaintiff seeks the taking and settling of a mere partnership account, it belongs to a court of equity. *Taylor v. Holman*, Mill's Const. (S. C.) 172. A bill in equity is held to lie for an account of goods sold on commission, if complicated, or if there be embarrassment in making proof, though the items are all on one side. *Taylor v. Tompkins*, 2 Heisk. (Tenn.) 89; and see *Hargrave v. Conroy*, 19 N. J. Eq. 281. But where the transactions between the parties have no business connection with each other, but stand entirely independent, as in case of a physician who renders services professionally to a farmer, and also buys produce of him, there is no jurisdiction in equity. *Haywood v. Hutchins*, 65 N. C. 574.

In New Jersey, the court of chancery will not entertain a bill by one partner of a lottery firm for a discovery and accounting, and a division of the proceeds of a lottery, which is illegal, and a misdemeanor by the laws of that State. And the fact that the lottery was conducted in another State where it was allowed by law, or that the drawing has been completed, so that nothing unlawful remains to be done (an accounting and distribution only being prayed), will make no difference. *Watson v. Murray*, 23 N. J. (Law) 257.

§ 4. **Appropriation.** In matters of account where several debts are due by the debtor to the creditor, it frequently becomes important to the parties to ascertain to which of such debts a particular payment should be appropriated. It is not easy in every

case to say how the appropriation ought to be made, but the following rules may be deemed well settled.

Where a person owes upon several distinct accounts, he has a right to direct his payments to be applied to any one of them as he chooses. This is called the *right* of appropriation. *Champenois v. Fort*, 45 Miss. 355; *King v. Andrews*, 30 Ind. 429; *Leef v. Goodwin*, Taney (C. C.), 460; *Bacon v. Brown*, 1 Bibb (Ky.), 334. But if this right be not exercised at the time of payment, the creditor may at any time apply the payment to which account he pleases. *Calvert v. Carter*, 18 Md. 73; *Haymes v. Waite*, 14 Cal. 446; *Mayor, etc. v. Patten*, 4 Cranch (U. S.), 317; *Hargroves v. Cooke*, 15 Ga. 321; *Nuttall v. Brannin*, 5 Bush (Ky.), 11. See *Waterman v. Younger*, 49 Mo. 413; *Howard v. McCall*, 21 Gratt. (Va.) 205. If no appropriation be made or indicated by either party, the application devolves on the law, or the court; which, it is said, will direct it according to equity. 1 Am. Lead. Cas. 283; *Emery v. Fichout*, 13 Vt. 15; *Leef v. Goodwin*, Taney (C. C.), 460; *Seymour v. Van Slyck*, 8 Wend. 403; *Campbell v. Vedder*, 1 Abb. Ct. App. (N. Y.) 295; S. C., 3 Keyes, 174. Generally, the payments will be applied to extinguish the debts according to priority of time. *Sprague v. Hazenwinkle*, 53 Ill. 419; *Langdon v. Bowen*, 46 Vt. 512; *St. Albans v. Failey*, id. 448; *Fairchild v. Holly*, 10 Conn. 176; *Crompton v. Pratt*, 105 Mass. 255. But this rule is not universal. If it appears that the intention of the parties was otherwise, the court will give effect to such intention. So, if there are separate demands, part of which are secured and part not secured, the application will be made on those not secured. *Langdon v. Bowen*, 46 Vt. 512; *Field v. Holland*, 6 Cranch (U. S.), 8. See *Vance v. Monroe*, 4 Gratt. (Va.) 53; *Stamford Bank v. Benedict*, 15 Conn. 438; *Chester v. Wheelwright*, 15 id. 562; *Callahan v. Boazman*, 21 Ala. 246; *Campbell v. Vedder*, 1 Abb. Ct. App. (N. Y.) 295; S. C., 3 Keyes, 174.

A creditor has no right to apply a general payment to an item of account which is illegal, as a claim for usurious interest; but if the debtor himself apply the payment to an illegal demand, he cannot afterward revoke it. *Rohan v. Hanson*, 11 Cush. 44; *Duncan v. Helm* 22 La. Ann. 418; *Bancroft v. Dumas*, 21 Vt. 456; *Ayer v. Hawkins*, 19 id. 26; *Caldwell v. Wentworth*, 14 N. H. 431; *Treadwell v. Moore*, 34 Me. 115. So, application of a general payment may be made to a debt within the statute of frauds. *Haynes v. Nice*, 100 Mass. 327, or to a debt barred

by the statute of limitations. *Jackson v. Burke*, 1 Dill. 311; *Ramsay v. Warner*, 97 Mass. 8.

Payments by a debtor upon a running account made partly before and partly after his discharge in bankruptcy, of which proceeding the creditor had no notice, may be applied by the latter to the items first due in the account. *Hill v. Robbins*, 22 Mich. 477.

Where a member of a firm is indebted, and the firm owe the same person, a payment made by such partner will be presumed to be on his own account. *Johnson v. Boone*, 2 Harr. (Del.) 172; see *Fairchild v. Holly*, 10 Conn. 175; *Sneed v. Wiester*, 2 A. K. Marsh. (Ky.) 277. But if the payment be of money belonging to the firm, it must be appropriated to the discharge of the partnership debt. *Thompson v. Brown*, Moody & M. 40.

The presumption that where a variety of transactions are included in one general account, the items of credit are to be appropriated to the items of debit in order of date in the absence of other appropriation. But such presumption may be rebutted by circumstances of the case showing that such could not have been the intention of the parties. See *City Discount Co. v. McLean*, L. R., 9 C. P. 692; S. C., 10 Eng. R. (Moak's ed.) 363. But such presumption is not rebutted by the fact that the debit items are for goods sold on condition that they shall not become the property of the purchaser till paid for, even though a memorandum of the condition is entered by the seller in his books containing the account. *Crompton v. Pratt*, 105 Mass. 255. For a full discussion of the subject of appropriation of payments, see "Payment."

§ 5. **Agency.** It is the duty of an agent, where the business in which he is employed admits of it, or requires it, to keep regular accounts of all his transactions on behalf of his principal, not only of his payments and disbursements, but also of his receipts; and to render such accounts to his principal at all reasonable times, without any suppression, concealment, or overcharge. Story on Agency, § 203; *Eaton v. Welton*, 32 N. H. 352. See *Haas v. Damon*, 9 Iowa, 589. This duty is strictly enforced in courts of equity; the most important agencies falling under the cognizance of such courts being those of attorneys, factors, bailiffs, consignees, receivers, and stewards. In most of these agencies, there are mutual accounts between the parties; but, even where the account is on one side only, the relation naturally gives rise to great personal confidence, and in cases of contro-

versy the principal is seldom able to establish his rights, or to ascertain the true state of the accounts, without resorting to equity to compel a discovery by the agent. See 1 Story's Eq. Juris., § 462; *Ormond v. Hutchinson*, 13 Ves. 53; *Taylor v. Tompkins*, 2 Heisk. (Tenn.) 89; *Massey v. Davies*, 2 Ves., Jr., 318. See *Rich v. Austin*, 40 Vt. 416. So, where the accounts are too complicated to be dealt with in a court of law, a court of equity will entertain jurisdiction. *Hill v. South Staffordshire Railway Co.*, 11 Jur. (N. S.) 192. The mere relation of principal and agent does not, however, entitle the principal to come into a court of equity for an account, if the matter can be fairly tried at law (1 Story's Eq. Juris., § 462, *a*; *Barry v. Stevens*, 3 Beav. 258); nor can an agent maintain a bill for an account solely upon the ground that he was entitled to commissions for his services. 1 Story's Eq. Juris., § 462, *a*. See *Haskins v. Burr*, 106 Mass. 48; *Hargrave v. Conroy*, 4 C. E. Green (N. J.), 281; *Moxon v. Bright*, L. R., 4 Ch. App. 292. And, in general, a bill will not lie by an agent against his principal, for an account, unless some special ground is laid, as the incapacity to get proof unless by discovery. *Dinwiddie v. Bailey*, 6 Ves. 136; *Wilson v. Mallett*, 4 Sandf. (S. C.) 112. But in the case of stewards, a discovery from his principal is ordinarily necessary, for, as has been said, "the nature of this dealing is, that money is paid in confidence, without vouchers, embracing a great variety of accounts with the tenants; and nine times in ten it is impossible that justice be done to the steward," without going into equity for an account against his principal. *Ib.* See 1 Story's Eq. Juris., § 462, note; *Lord Hardwicke v. Vernon*, 4 Ves. 411, 418, note.

It has been held that an agent cannot be called on for an accounting in chancery, where the agency was for a single transaction, as a single consignment, or the delivery of money to be laid out in the purchase of an estate. *Coquillard v. Suydam*, 8 Blackf. (Ind.) 24; *Navulshaw v. Brownrigg*, 7 Eng. Law & Eq. 106. But although a suit at law may be often maintainable in such cases, the party frequently has an election of remedy, and may resort to a court of equity for the attainment of justice. *Scott v. Surman*, Willes. 405; *Zetelle v. Myers*, 19 Gratt. (Va.) 62. The true source of jurisdiction is the necessity of reaching the facts by a discovery; and having jurisdiction for such a purpose, a court of equity, to avoid multiplicity of suits, will proceed to administer the proper relief. *Post v. Kimberly*, 9 Johns. 493; *Porter v. Spencer*, 2 Johns. Ch. 171; *Ludlow v. Simond*, 2

Cal. Cas. 1, 38, 52. See *Durant v. Einstein*, 5 Rob. (N. Y.) 423; 35 How. 223; *Conyngham's Appeal*, 57 Penn. St. 474; *Mason v. Man*, 3 Desau. 116; *Hale v. Hale*, 4 Humph. (Tenn.) 183.

Cases of account between trustees and *cestuis que trust* come very appropriately within the jurisdiction of courts of equity, and the same general rules are applicable as in other cases of agency. A trustee is not permitted to make the concerns of his trust profitable to himself, nor, on the other hand, is he liable for any loss occurring in the discharge of his duties, in the absence of negligence, malversation, or fraud on his part. See *Quackenbush v. Leonard*, 9 Paige, 334; *Slade v. Van Vechten*, 11 Paige, 21; *Barksdale v. Finney*, 14 Gratt. (Va.) 338; *Andrews v. Hobson*, 23 Ala. 219; *Hubbell v. Medbury*, 53 N. Y. (8 Sick.) 98; 54 id. 683. The same rules are applicable to cases of guardians and wards, and other relations of a similar character. See 1 Story's Eq. Juris., § 465.

In all cases where it is necessary that an accounting should be had to ascertain the rights of tenants in common (*Darden v. Cowper*, 7 Jones' L. [N. C.] 210; *Field v. Craig*, 8 Allen, 357; *Leach v. Beattie*, 33 Vt. 195), joint-tenants, partners or part-owners of ships (*McClellan v. Osborne*, 51 Me. 118; *Dyckman v. Valiente*, 42 N. Y. [3 Hand] 549), equity has jurisdiction. But see *Pico v. Columbet*, 12 Cal. 414. Such cases involve peculiar agencies similar to those of bailiffs, or managers of property, and require the same operative power of discovery, and the same interposition of equity. 1 Story's Eq. Juris., § 466; *Strelly v. Wilson*, 1 Vern. 297. This subject will be further discussed under subsequent heads.

§ 6. **Apportionment.** Most cases of apportionment involve matters of account, in which a *discovery* is essential for the purposes of justice; but aside from this ground of jurisdiction, there are other distinct grounds upon which courts of equity will exercise jurisdiction in such cases, in order to avoid circuitry and multiplicity of actions. As it regards apportionment in its application to contracts generally, the rule of the common law is, that an entire contract is not apportionable, unless specially stipulated by the parties, and courts of equity have very generally adopted the maxim, *æquitas sequitur legem*. See 1 Story's Eq. Juris., § 470; *Granger v. Bassett*, 98 Mass. 462; *Holmes v. Taber*, 9 Allen, 246. Thus, in the familiar illustration, where the mate of a ship engaged for a voyage at a certain sum agreed upon therefor, and died during the voyage, it was held, that at

law there could be no apportionment of the wages. *Cutler v. Powell*, 6 T. R. 320. Where, however, equitable circumstances intervene, courts of equity will interfere to grant redress; as, in the case of an apprentice-fee of a fixed sum being given, and the master afterward becomes bankrupt, equity will interfere upon the ground of the failure of the contract from accident, and decree an apportionment of the premium so given. *Hale v. Webb*, 2 Bro. Ch. 78. So, in some other cases, an apportionment of the apprentice-fee has been decreed. See 1 Story's Eq. Juris., § 473. But, on the other hand, where a premium has been paid and the apprenticeship has been dissolved by request of the friends of the apprentice, but without any default in the master, and without any agreement for a return of any part of the premium, there a court of equity will not interfere. No equity attaches itself to such a transaction, nor does the contract import any return. *Id.*, § 474; *Hirst v. Tolson*, 13 Jurist, 596; *Hale v. Webb*, 2 Bro. Ch. 78.

Apportionment of *rent* is not unfamiliar to the administration of the law. In equity it is apportionable generally, or rather, each beneficiary is required to contribute according to the benefit he has shared in the use of the premises. See *Hall v. Stevenson*, 13 Abb. N. S. (N. Y.) 196, 202. In respect to their apportionment in certain cases, the same rule is not applicable to rents *service* and rents *charge*. If one having a rent service purchase a part of the land out of which it issues, it extinguishes the rent *pro rata*, and leaves it good for the balance. So if he release a part of his rent, the residue is not discharged. 2 Washb. Real Prop. 17; *Ingersoll v. Sergeant*, 1 Whart. (Penn.) 337; Bac. Abr., Rent M. But if it be a rent charge, and the holder of the rent purchases any part of the premises, the rent is wholly extinct. So if he releases any part of the land which is charged, the balance is wholly discharged, and the rent will not be apportioned. 2 Washb. Real Prop. 17. But there is nothing in the nature of a rent charge which absolutely prevents its being apportioned; for it is well settled that where the division of the land charged, into several portions, is by the operation of law, an apportionment will take place. Thus, if a part of the lands charged with a rent descend to the grantee of the rent, it being the act of the law and not of the grantee, the rent will not thereby be wholly extinguished, but only *pro rata*. *Id.* 17, 18; 1 Story's Eq. Juris., § 475, *a*; *Van Rensselaer v. Chadwick*, 22 N. Y. (8 Smith) 32; S. C., 24 Barb. 333; *Cruger v. McLaurry*, 41 N. Y. (2 Hand) 219; S. C., 51 Barb. 642.

Where tenants in common of land subject to a rent charge, upon a partition, interchange conveyances of their respective parcels, subject, in terms, to the claims of the lessor, an apportionment of the rent is effected if the lessor concurs in the arrangement. The release by the lessor, in such a case, to one of the tenants of the parcel partitioned to him, only extinguishes the rent as to the parcel so released. The other parcel remains liable to its due proportion. *Van Rensselaer v. Chadwick*, 22 N. Y. (8 Smith) 32.

In every lease of land, the lessor is so far bound, by implication, for the title and enjoyment by the lessee, that his right to the rent is dependent thereon; and if the tenant is evicted from the demised premises, the rent is thereby suspended. *Poston v. Jones*, 2 Ired. Eq. (N. C.) 350. So if the lessor be evicted of a part of the land demised, by a stranger on title paramount, it operates as a suspension of the rent *pro tanto*, and the rent is apportioned and payable only in respect of the residue. *Ib.*

Upon the death of a tenant for life, in the middle of a quarter, his representative is not entitled to an apportionment of the rent. *Gee v. Gee*, 2 Dev. & Bat. Eq. (N. C.) 103. As to the apportionment of rent where the premises out of which the rent issued are destroyed by fire or otherwise, see 3 Kent's Com. 466, and notes; *Cutler v. Potts*, 2 Hay. (N. C.) 26; S. C., *id.* 60.

A rent service incident to a reversion will not be lost by a grant of part of the reversion, but will be apportioned. And the right of apportionment attaches the instant the sale is made. *Linton v. Hart*, 25 Penn. St. 193; *Reed v. Ward*, 22 *id.* 144. A rent payable in produce and services is apportionable. *Van Rensselaer v. Gifford*, 24 Barb. 349.

§ 7. Contribution. In order the more effectually to do justice to all the parties, courts of equity frequently assume jurisdiction over matters of account in cases of contribution. And it is held that the jurisdiction in equity, in such cases, is not affected, because a remedy now exists at common law. *Hickman v. McCurdy*, 7 J. J. Marsh. (Ky.) 559; *Veile v. Hoag*, 24 Vt. 46; *Wayland v. Tucker*, 4 Gratt. (Va.) 268; *Couch v. Terry*, 12 Ala. 225. The doctrine of contribution is said to rest on the principle that when the parties stand in *equali jure*, the law requires equality which is equity, and one of them shall not be obliged to bear the burden in ease of the rest. It is founded, not on contract, but on the principle that equality of burden as to common right is equity. And the obligation to contribute arises from the

nature of the relation between the parties. *Campbell v. Mesier*, 4 Johns. Ch. 334; S. C., 6 id. 21; *Aspinwall v. Sacchi*, 57 N. Y. (12 Sick.) 331, 335; *White v. Banks*, 21 Ala. 705; *Russell v. Failer*, 1 Ohio St. (N. S.) 327. If the liability arise *ex delicto* there is no right to contribution, for there is no equity between wrong-doers. *Adams' Eq.* 268; *Bartle v. Nutt*, 4 Pet. (U.S.) 184; *Peck v. Ellis*, 2 Johns. Ch. 131; *Miller v. Fenton*, 11 Paige, 18. Though this rule is held to be applicable only where the parties, who claim contribution, have engaged together in doing, knowingly or wantonly, a wrong. *Moore v. Appleton*, 26 Ala. 633; *Armstrong County v. Clarion County*, 66 Penn. St. 218; S. C., 5 Am. R. 368; *Acheson v. Miller*, 2 Ohio (N. S.), 203.

The subject of contribution may be illustrated by the case, where different parcels of land are included in the same mortgage, and are afterward sold to different purchasers, each holding in fee and severalty the parcel sold to himself. Each purchaser is bound to contribute to the discharge of the common burden or charge, in proportion to the value which his parcel bears to the whole included in the mortgage. *Stevens v. Cooper*, 1 Johns. Ch. 425; *Cheeseborough v. Millard*, id. 409, 415; *Taylor v. Porter*, 7 Mass. 355. To ascertain the relative values of each is, however, a matter attended with much difficulty; and without a resort to a court of equity in such a case, the most serious embarrassments may arise in fixing the proportion of each purchaser, and in making it conclusive upon all others. See 1 Story's Eq. Juris., §§ 484, 485; *Hyde v. Tracy*, 2 Day (Conn.), 422; *Cutter v. Emery*, 37 N. H. 567; *Ransom v. Keyes*, 9 Cow. 128.

Another illustration of the equity for contribution is found in the doctrine of *general average*. This, in the sense of the maritime law, means a general contribution, that is to be made by all parties in interest, toward a loss or expense, which is voluntarily sustained or incurred for the benefit of all. The principle upon which this contribution is founded, is held not to be the result of contract, but has its origin in the plain dictates of natural law. Abb. on Shipp. 342; 1 Story's Eq. Juris., § 490; *Stirling v. Forrester*, 3 Bligh, 590, 596; *Louisville Ins. Co. v. Bland*, 9 Dana (Ky.), 147; *Nimic v. Holmes*, 25 Penn. St. 371.

The circumstances under which this equity arises are where a ship and cargo are in imminent peril, and a portion is intentionally sacrificed for the security of the rest; as, where goods are thrown overboard, or a portion of the ship's rigging cut away, to lighten and save the ship, or the ship itself is intentionally

stranded, to save her cargo from a tempest or an enemy, or a part of the cargo is delivered up by way of ransom, or is sold for the necessity of the ship. In all these cases the impending danger is common to all, and the means by which it is averted ought to be a common burden. If, therefore, the ship and the residue of the cargo are preserved by the sacrifice, the parties interested in the ship, her freight, and the merchandise on board, must make good ratable shares of the loss, proportioned to the value which their own goods and the goods sacrificed would have borne, after deducting freight, had they safely reached the port of discharge. If, on the contrary, the sacrifice is not intentionally made, but is damage incurred by violence or stress of weather, or if it prove unavailing, or be made not to save the cargo, but to save the lives and liberty of the crew, the principle of contribution does not apply, and the loss must remain where it originally falls. *Adams' Eq.* 271; *Sims v. Gurney*, 4 Binn. (Penn.) 524; *Williams v. Suffolk Ins. Co.*, 3 Sumn. 513; *Crockett v. Dodge*, 3 Fairf. (Me.) 190. The rates of contribution are generally settled by arbitration, but the parties cannot be compelled to refer, and may have recourse to an action at law or a suit in equity. *Adams' Eq.* 271; *Sturgess v. Cary*, 2 Curtis (C. C.), 59; *Gillett v. Ellis*, 11 Ill. 579. A court of equity affords a safe, convenient, and expeditious remedy; and it is accordingly the customary mode of remedy in all cases, where a controversy arises, and a court of equity exists in the place, capable of administering the remedy. 1 *Story's Eq. Juris.*, § 491; *Merithew v. Sampson*, 4 Allen, 192; *Hallett v. Bousefield*, 18 Ves. 190, 196.

The beneficial effects of equity jurisdiction over matters of account may also be seen in cases of contribution between *sureties*. Such contribution may, indeed, be enforced at law, as well as in equity. See *Harris v. Ferguson*, 2 Bailey, 397; *Norton v. Coons*, 3 Denio, 130; *Rindge v. Baker*, 57 N. Y. (12 Sick.) 209, 215; S. C., 15 Am. R. 475. But the jurisdiction now assumed in courts of law, in no way affects that originally and intrinsically belonging to equity, and there are many cases in which the relief is more complete and effectual in equity than it can be at law. See *Edsell v. Briggs*, 20 Mich. 429; 1 *Story's Eq. Juris.*, § 496.

The right of contribution arises between *sureties* where one has been called on to make good the principal's default, and has paid more than his share of the entire liability. *Adams' Eq.* 269; *Pinkston v. Taliaferro*, 9 Ala. 547; *Mitchell v. Sproul*, 5 J. J. Marsh. (Ky.) 264. And the right exists notwithstanding the sev-

eral sureties sign without any communication with each other. *Norton v. Coons*, 6 N. Y. (2 Seld.) 33; S. C., 3 Denio, 130; *Chaffee v. Jones*, 19 Pick. 260, 264. But he can only call for contribution when he has paid more than his proportion of the debt, and then for no more than the excess. *Rutherford v. Branch Bank*, 14 Ala. 92; *Lytle v. Pope*, 11 B. Monr. (Ky.) 309; *Fletcher v. Grover*, 11 N. H. 368, 373-4. See *Taylor v. Morrison*, 26 Ala. 728; *Ilaley v. Jewell*, 2 Metc. 168. So, a surety, who has paid the whole debt, must show the insolvency of the principal, to entitle him to contribution against his co-surety. *Allen v. Wood*, 3 Ired. Eq. (N. C.) 386; *Daniel v. Ballard*, 2 Dana (Ky.), 296; *Pearson v. Duckham*, 3 Litt. (Ky.) 385. Or must show that he has used due diligence, without effect, to obtain reimbursement. *McCormack v. Obannon*, 3 Munf. (Va.) 484. And a surety who has neglected to interpose a legal defense, as, for instance, the statute of limitations, is not entitled to claim contribution from the rest. *Fordham v. Wallis*, 17 Jurist, 228. But where the estate of a deceased surety of a principal debtor was discharged from liability to the creditor, through his negligence, by operation of the statute of limitations, and a co-surety afterward paid the debt, it was held that the estate was liable to contribute to such co-surety, notwithstanding it was released from direct liability to the creditor. *Camp v. Bostwick*, 20 Ohio St. 337; S. C., 5 Am. R. 669. The doctrine of contribution has its origin in the relation of co-sureties or other joint promisors in the same degree of obligation. It is not founded upon the contract of suretyship, but is an equity which springs up at the time the relation of co-sureties is entered into, and ripens into a cause of action where one surety pays more than his proportion of the debt. From this relation the common law implies a promise to contribute in case of unequal payments by co-sureties. *Ib.* *Russell v. Failor*, 1 Ohio St. 327. But equity resorts to no such fiction. It equalizes burdens and recognizes and enforces the reasonable expectations of co-sureties, because it is just and right in good morals, and not because of any supposed promise between them. 1 Lead. Cas. Eq. 105; *Aspinwall v. Sacchi*, 57 N. Y. (12 Sick.) 331, 336. This equity having once arisen between co-sureties, this reasonable expectation that each will bear his share of the burden is, as it were, a vested right in each, and remains for his protection until he is released from all his liability in excess of his ratable share of the burden. Neither the creditor, the principal, the statute of limitations, nor the death of a party, can

take it away. *Camp v. Bostwick*, 20 Ohio St. 337; S. C., 5 Am. R. 669; *Howe v. Ward*, 4 Greenl. (Me.) 195; *Bachelor v. Fiske*, 17 Mass. 464; *Boardman v. Paige*, 11 N. H. 431; *Aspinwall v. Sacchi*, 57 N. Y. (12 Sick.) 337, 338.

In some of the States of the Union, courts of law now follow the rule adopted in courts of equity in apportioning the share of an insolvent surety upon those who remain solvent. See *Henderson v. McDuffee*, 5 N. H. 38; *Mills v. Hyde*, 19 Vt. 59; *Aiken v. Peay*, 5 Strobb. (S. C.) 15; *Jones v. Blanton*, 6 Ired. Eq. (N. C.) 116; 1 Story's Eq. Juris., § 496, *a*. That equity, where the principal is insolvent, will restrain a surety from fraudulently stripping himself of his property, so as to throw the burden of the debt on his co-surety. See *Bowen v. Hoskins*, 45 Miss. 183.

There are many other cases of contribution, in which courts of equity exercise jurisdiction for the purposes of justice, but a discussion of them will be found under other and appropriate heads. For a general view of the subject, see Contribution.

§ 8. **Liens.** Matters of account, constituting ground for the interference of courts of equity, also arise out of the subject of *liens*. And in many cases of this kind, a resort to a court of equity, to ascertain and adjust the account, would seem to be absolutely indispensable for the purposes of justice. See *Pattij v. Pease*, 8 Paige, 277; *Skeel v. Spraker*, *id.* 182; see, also, title Liens.

§ 9. **Rents and profits.** Equity has jurisdiction in many cases of account, pertaining to *rents and profits*, not only when they arise from privity of contract, but also when they arise from adverse claims and titles, asserted by different persons. See Bac. Abr., *Accompt*, B. Accounts between landlord and tenant frequently extend over a long period of time; and in cases of this kind, where there are controverted claims, a resort to courts of equity often becomes necessary in order to obtain a due adjustment of the respective rights of each party. See 1 Story's Eq. Juris., § 508; *Hodges v. Pingree*, 10 Gray, 14. In the ordinary case of mesne profits, where there is a clear remedy at law, courts of equity will not interfere, unless there are some special circumstances, rendering interference necessary. But, if such circumstances exist, equity will interfere, not only in cases arising under contract, but in those arising under torts also; as, where a man intrudes upon an infant's lands, and takes the profits, he may be compelled to account for them, and will be treated as a guardian or trustee for the infant. *Dormer v. For-*

tescue, 3 Atk. 129; *Carey v. Burtie*, 2 Vern. 342. So, if there is a trust estate, and the *cestui que trust* comes into equity upon his title to recover the estate, he will be decreed to have the further relief of an account of the rents and profits. *Dormer v. Fortescue*, 3 Atk. 129; and see *Curtis v. Curtis*, 2 Bro. Ch. 620; 1 Story's Eq. Juris., § 512.

It has been held, that where matters of account affecting heirs relate entirely to the rents, issues, and profits of lands in controversy, and would be included in an adjustment of the rights to the land, there is no sufficient reason for taking them into equity for settlement. *Claussen v. Lafranz*, 4 Greene (Iowa), 224.

§ 10. **Waste.** It would seem to be the established doctrine, that to maintain jurisdiction in equity for an account in cases of waste, there should be a prayer for an injunction to prevent future waste. See *Grierson v. Eyre*, 9 Ves. 89; *Pulteney v. Warren*, 6 id. 89; *Phillips v. Allen*, 5 Allen, 85. Though the better doctrine probably is, "that where discovery is sought, and is obtained, there, also, to prevent multiplicity of suits, an account ought to be decreed without the additional ingredient of an injunction to stay future waste." See 1 Story's Eq. Juris., § 518; *Watson v. Hunter*, 5 Johns. Ch. 169; Eden on Injunct. 206; Kerr on Injunct. 284. Mines and collieries, being a species of trade, an account of profits will in all cases be granted without reference to the question whether or not an injunction will lie; or whether or not there is a remedy at law. Id. 285.

ARTICLE II.

WHEN NO ACTION CAN BE MAINTAINED.

Section 1. In general. It may be stated generally, that courts of equity decline jurisdiction in matters of account: 1. Where the demands are all on one side, and no discovery is claimed or necessary; 2. Where on one side there are demands, and on the other mere payments or set-offs, and no discovery is sought or required. *Lafever v. Bellmyer*, 5 W. Va. 33; *Gloninger v. Hazard*, 42 Penn. St. 389; *McMartin v. Bingham*, 27 Iowa, 234; *Haywood v. Hutchins*, 65 N. C. 574. In these cases, there is not only a complete remedy at law, but there is nothing requiring the peculiar aid of equity, to ascertain or adjust the claim. See Id.; *Foster v. Spencer*, 2 Johns. Ch. 171; *Durant v. Einstein*, 35 How. 223, 241; S. C., 5 Rob. 423.

It has been held, that a court of equity will not entertain a bill for an account, even between partners, when the items, both of credit and debit, arise from a special contract, and are few and for fixed and definite sums and easily ascertained by the verdict of a jury. *Lesley v. Rosson*, 39 Miss. 368. So, the mere relation of creditor of the defendant is not, of itself, sufficient to entitle the plaintiff to an accounting. *Salter v. Ham*, 31 N. Y. (4 Tiff.) 321. For other instances in which jurisdiction in equity over accounts has been denied or declined, upon the ground that under the peculiar circumstances equity ought not to interfere, see *Southgate v. Montgomery*, 1 Paige, 41; *Morris v. Mowatt*, 4 id. 142; *Fowle v. Lawrason*, 5 Pet. (U. S.) 494; *Poage v. Wilson*, 2 Leigh (Va.), 490; *Oliver v. Palmer*, 11 Gill. & J. (Md.) 426.

§ 2. *Defenses to action.* In some cases the right of a party to sue in equity for an accounting, though originally good, may be impaired or defeated; as, by long-continued delay to prosecute the suit. *Bolling v. Bolling*, 5 Munf. (Va.) 334; *Mooers v. White*, 6 Johns. Ch. 360; or by the pendency of another suit covering the same matters. *Boyd v. Hawkins*, 2 Dev. (N. C.) 195; *Hertell v. VanBuren*, 3 Edw. Ch. 20; or by the death of a party to the transactions in question. *Bertine v. Varian*, 1 Edw. Ch. 343; *Randolph v. Randolph*, 2 Call (Va.), 537; or by a previous voluntary accounting. *Id.*; *Heartt v. Corning*, 3 Paige, 566; *Weed v. Small*, 7 id. 573. So, where transactions have become obscure and entangled by delay and time, a court of equity will not readily decree an account. There is, however, no precise rule on this subject; each case depending upon the exercise of a sound discretion on the circumstances. *Rayner v. Pearsall*, 3 Johns. Ch. 578.

CHAPTER V.

OF ACTIONS RELATING TO ACCOUNTS, OR TO AN
ACCOUNT STATED.

ARTICLE I.

ACTIONS UPON OR RELATING TO ACCOUNTS.

Section 1. What is a matter of account. Matters of account properly chargeable, and for the recovery of which an action will lie, include personal property sold and delivered, services performed, and materials found and provided, and the use of such property hired and returned. See, generally, *Merrill v. Ithaca & Owego R. R. Co.*, 16 Wend. 586; *Terrill v. Beecher*, 9 Conn. 344; *Clark v. Savage*, 20 id. 258; *Fry v. Slyfield*, 3 Vt. 246; *Austin v. Wheeler*, 16 id. 95; *Shoemaker v. Kellogg*, 11 Penn. St. 310. Lottery tickets have been held properly chargeable in a book account in Delaware. *Rogers v. Bailey*, 4 Harr. 256; *Gregory v. Bailey*, id.; and see, also, *May v. Brownell*, 3 Vt. 463. And where parties have mutual dealings, and rent from one to another becomes a subject of account between them, by mutual understanding and arrangement, it is recoverable in an action on account. *Nedvidek v. Meyer*, 46 Mo. 600.

On this subject the "book debt" law of the various States should be consulted.

§ 2. **What is not a matter of account.** Charges in a book, which are not in the nature of liquidated sums, or prices or values, but damages which can be rendered certain only by convention or judicial decision, are held not matters of book account. *Swing v. Sparks*, 7 N. J. L. (2 Halst.) 59. See *Stow v. Black*, 37 Vt. 25; *Scott v. Lance*, 21 id. 507. Nor are special or executory contracts, especially concerning lands, bonds, bills, notes, etc., proper matters of book account. *Wilson v. Wilson*, 6 N. J. L. (1 Halst.) 95. See *Stevens v. Damon*, 29 Vt. 521. So, it has been held, that a charge of a specified sum, as difference on exchange of chattels, cannot be stated as a matter of book account, but should be specially set forth. *Anonymous*, 16 N. J. L. (1 Harr.) 395. And, among other things, not regarded as matters of account, may be mentioned compensation for the use and occupation of

land. *Case v. Berry*, 3 Vt. 332; a balance due on a promissory note, *Stevens v. Damon*, 29 id. 521; damages for a tort, *Peach v. Mills*, 14 id. 371; *Brinsmaid v. Mayo*, 9 id. 31; or for the breach of a special contract remaining unexecuted but in part, *Smith v. Smith*, 14 id. 440.

§ 3. **Books of account, how kept.** The mere form in which a charge is made upon or in books of account is not material in determining the right to recover therefor. *Scott v. Lance*, 21 Vt. 507. The law does not require that books of account should be kept in strict accordance with the most approved systems of book-keeping. They may be kept in the form of an ordinary journal or day-book, or in ledger form, where the account of each man dealing with the party is kept by itself. *Prince v. Smith*, 4 Mass. 55; *Slade v. Teasdale*, 2 Bay. (S. C.) 173. So, almost any series of figures, abbreviations and words, which can be explained into a signification, will do for particular charges, if conformable to the party's ordinary course of making his entries, the language he speaks, his degree of education, and the nature of his business. *Rowland v. Burton*, 2 Harr. (Del.) 288; *Stroud v. Tilton*, 4 Abb. Ct. App. (N. Y.) 324; S. C., 3 Keyes, 139; *Merrill v. Ithaca & Owego R. R. Co.*, 16 Wend. 595. But as books of account are intended to keep a correct statement of the items of an account, with the date, quantity, price, or value of each item, it is a general rule, that entries are improper when made in gross or by the lump. Such is a charge by a mechanic for "190 days' work." *Lynch's Adm'r v. Petrie*, 1 Nott & M. (S. C.) 130. Or a charge by a physician, of thirteen dollars, for medicine and attendance in curing the whooping cough. *Hughes v. Hampton*, 2 Const. Rep. 745. See 2 Wait's Law & Pr. 449. A physician may, however, properly include in one charge the items of medicine furnished, as well as the compensation for his visit, on any single occasion. But a merchant's bill must be made out differently. He cannot charge for a bill of goods sold in gross, but must give the date, articles, quantity, value, or other specification requisite to an accurate account. *Ib.*

§ 4. **Books, how proved.** The rules in the several States in regard to the proof of books of account are far from being uniform. Generally, before the books of the party can be admitted in evidence, they are to be submitted to the inspection of the court, and if they do not appear to be a register of the daily business of the party, and to have been honestly and fairly kept, they are excluded. *Churchman v. Smith*, 6 Whart. (Penn.) 106. If the

books appear free from fraudulent practices, and proper to be laid before the jury, then, in many of the States, the party himself is required to make oath, in open court, that they are the books in which the accounts of his ordinary business transactions are usually kept. See *Taylor v. Tucker*, 1 Kelly, 233; *Hale v. Ard*, 48 Penn. St. 22; *Funk v. Ely*, 45 id. 444; *Frye v. Barker*, 2 Pick. 65; *Bassett v. Spofford*, 11 N. H. 167; *Rowland v. Burton*, 2 Harr. (Del.) 288; *Fitzgibbon v. Kenny*, 3 id. 317; *Kitchen v. Tyson*, 2 Murph. (N. C.) 314; *Foster v. Sinkler*, 1 Bay. (S. C.) 40; *Nickerson v. Morin*, 3 Wis. 243. In New York the rule is, that to render books of account competent evidence, the party must prove that during the period that the charges were made, he had no clerk; that some of the articles or work were delivered or performed; that the books are the account books of the party, and that he keeps correct accounts. *Vosburgh v. Thayer*, 12 Johns. 461; *Tomlinson v. Borst*, 30 Barb. 42; *Stroud v. Tilton*, 3 Keyes, 139; S. C., 4 Abb. Ct. App. 326. And it now seems to be the settled law of the State, that parties may introduce books of account in evidence, and a party may supply, if he can, the preliminary proof of the correctness of the books by his own oath, whenever it is made to appear that the party had no clerk; or, if he had one, that the clerk was dead. *Burke v. Wolfe*, 6 Jones & Spen. (N. Y.) 263.

For a full discussion of this subject, which more appropriately falls under the head of Evidence, see 2 Wait's Law & Pr. 436 *et seq.*

ARTICLE II.

ACTIONS UPON OR RELATING TO AN ACCOUNT STATED.

Section 1. An account stated. In general. An *open account* is defined to be one in which some item of the contract is not settled by the parties, whether the account consists of one item or of many. *Sheppard v. Wilkins*, 1 Ala. 62; *Goodwin v. Harrison*, 6 Ala. 438. But a *stated account* is an agreement between the parties to an account, that all the items are true. *Stebbins v. Niles*, 25 Miss. 267. To make a stated account requires two parties, the debtor and the creditor. There must be a mutual agreement between them as to the allowance and disallowance of the respective claims, and as to the balance as it is struck upon the final adjustment of the whole account and demands of both sides. Their minds must meet as in making other agreements,

and they must both assent to the account and the balance as correct. *Stenton v. Jerome*, 54 N. Y. (9 Sick.) 480; *Lockwood v. Thorne*, 12 N. Y. (1 Kern.) 170; *Kock v. Bonitz*, 4 Daly (N. Y.), 117. That the stating of an account is in the nature of a new promise. See *Holmes v. D'Camp*, 1 Johns. 34; *Montgomery v. Ives*, 17 Johns. 38; *Hoyt v. Wilkinson*, 10 Pick. 31; *White v. Campbell*, 25 Mich. 463. The balance of a stated account is principal, and it cannot be re-examined to ascertain the items or their character. *McClelland v. West*, 70 Penn. St. 183.

§ 2. **Rendering an account.** An account rendered is an admission, and *prima facie* evidence against the party making it, but does not estop him from showing the truth. It is still open to explanation for any omissions or mistakes. *Champion v. Joslyn*, 44 N. Y. (5 Hand) 653; *Schettler v. Smith*, 34 N. Y. Supr. Ct. 17; and see *Williams v. Glenney*, 16 N. Y. (2 Smith) 389; *Daniels v. Wilber*, 60 Ill. 526; *Nicholson v. Pelanne*, 14 La. Ann. 508; *Beebe v. Robert*, 12 Wend. 413; *Smith v. Tucker*, 2 E. D. Smith (N. Y.), 193. So evidence of the reason why certain items do not appear in an account rendered is held to be immaterial. The party may show the fact that such items exist, notwithstanding their omission from his account, but is confined to his facts, and his reasons or motives for the omission are held to be of no importance. *Champion v. Joslyn*, 44 N. Y. (5 Hand) 653.

§ 3. **Mutual agreements.** The conversion of an open account into an account stated is an operation by which the parties *assent* to a sum as the correct balance due from one to the other; and whether this operation has been performed or not, in any instance, must depend upon the facts. That it has taken place, may appear by evidence of an express understanding, or of words and acts, and the necessary and proper inferences from them. *White v. Campbell*, 25 Mich. 463. But in all cases there must be proof, in some form, of an express or implied assent to the account rendered by one party to the other, before the latter can be held to be so far concluded that he can impeach it only for fraud or mistake. *Stenton v. Jerome*, 54 N. Y. (9 Sick.) 480; *Lockwood v. Thorne*, 11 N. Y. (1 Kern.) 170; S. C., 18 N. Y. (4 Smith) 288, 290. No account can be legally stated by persons who are not competent to make a valid contract. *Holmes v. D'Camp*, 1 Johns. 34. And for this reason, an infant is not bound by an account stated, even though he expressly agrees to it. *Trueman v. Hurst*, 1 Term R. 40. It is not necessary that an account should be signed by the parties to make it a stated account.

Bruen v. Hone, 2 Barb. 586; *Lockwood v. Thorne*, 11 N. Y. (1 Kern.) 170, 173; *Brown v. Vandyke*, 8 N. J. Eq. (4 Halst.) 795. So, to constitute an account stated, it is not necessary that there should be mutual or cross demands. They may be all on one side, or consist of charges and the acknowledgment of payment. The simple rendering of the items of an account between the parties, and the striking of a balance, or agreeing upon the amount due, is sufficient; and upon such a state of fact an action on an account stated may be maintained. *Kock v. Bonitz*, 4 Daly (N. Y.), 117; *Knowles v. Michel*, 13 East, 249; *Hutchinson v. Market Bank of Troy*, 48 Barb. 302; *Cobb v. Arundell*, 26 Wis. 553.

§ 4. **Admissions, etc.** When a defendant acknowledges his indebtedness for a specific sum, being a balance of an account, the court is at liberty to treat it as an account stated, and give judgment for such balance. *May v. Kloss*, 44 Mo. 300. Otherwise, if the acknowledgment is qualified or conditional (*Evans v. Verity*, Ryan & M. 239); or, the amount of the indebtedness is not specified. *Lane v. Hill*, 18 Ad. & Ell. (N. S.) 252; *Kirton v. Wood*, 1 Mood & Rob. 253. So, merely giving a note for the balance is not necessarily an admission of the correctness of an account (*Morton v. Rogers*, 14 Wend. 576); though it is held to be *prima facie* evidence of a settlement of accounts between the parties. *Dutcher v. Porter*, 63 Barb. 15; *Treadwell v. Abrahams*, 15 How. (N. Y.) 219. See *Stiles v. Brown*, 1 Gill. (Md.) 350. And a party signing his name to an account current is not conclusive evidence of his owing the amount therein stated. The implied admission in such case may be rebutted by competent proof, as fraud, error or mistake. *Miller v. Probst*, Add. (Penn.) 334; *Kirkpatrick v. Turnbull*, id. 260; *Nichols v. Alsop*, 6 Conn. 447; *Perkins v. Hart*, 11 Wheat. (U. S.) 237. But payment of the balance, shown by an account to be due to the party receiving it, has been held an admission of the correctness of the account, though not absolutely conclusive. *Bruen v. Hone*, 2 Barb. 586; *Lockwood v. Thorne*, 11 N. Y. (1 Kern.) 170; reversing S. C., 24 Barb. 391. As to express admissions, sufficient to bind the party, see *Thurmond v. Sanders*, 21 Ark. 255; *Owen v. Boerum*, 23 Barb. 187.

§ 5. **No objection made.** If one party presents his account to the other, and the latter makes no objection, it may well be inferred that he is satisfied with and assents to it as correct. So, if an account be made up and transmitted by one party to the

other by mail, and the latter keeps it for some considerable time without making any objection, he is held to have acquiesced in it. *Stenton v. Jerome*, 54 N. Y. (9 Sick.) 480. A very general statement of the rule is, that when a party indebted upon an account receives and retains it beyond such time as is reasonable under the circumstances and according to the usage of the business, for examining and returning it, without communicating any objections, he is considered to acquiesce in its correctness, and he becomes bound by it as an account stated. Signature to the account, or express admission, is not necessary. *Case v. Hotchkiss*, 1 Abb. Ct. App. (N. Y.) 324; *Townley v. Denison*, 45 Barb. 490; *Terry v. Sickles*, 13 Cal. 427; *White v. Hampton*, 10 Iowa, 238; *Tharp v. Tharp*, 15 Vt. 105; *Langdon v. Roane*, 6 Ala. 518. This rule is held to apply to accounts between merchants residing in different countries (*Murray v. Toland*, 3 Johns. Ch. 569; *Stebbins v. Niles*, 25 Miss. 267; *Freeland v. Heron*, 7 Cranch [U. S.], 147); and it also applies to an account between an attorney and his client. *Case v. Hotchkiss*, 1 Abb. Ct. App. (N. Y.) 324; S. C., 3 Keyes, 334; *Pulliam v. Booth*, 21 Ark. 420. But it is held that the rule ought not to be applied in favor of the party, as where he claims that the statute of limitations commenced to run from the time of rendering the account. In such case he must show some word or act marking or implying that he assented to the account. *White v. Campbell*, 25 Mich. 463. See *Randel v. Ely*, 3 Brewst. (Penn.) 270.

What is to be regarded as a reasonable time within which to object to an account rendered, where there is no dispute as to the facts, is matter of law. But where the proofs are contradictory, the question is one of law and fact; and in that case may properly be submitted to the jury, under the instructions of the court as to the law. *Wiggins v. Burkham*, 10 Wall. (U. S.) 129. See *Lockwood v. Thorne*, 11 N. Y. (1 Kern.) 170; *Davis v. Tiernan*, 3 Miss. (2 How.) 786.

An account containing an item of a loan to a third person, for which the party to whom it is rendered is not responsible, does not become conclusive as an account stated, by being retained for several months (*Porter v. Lobach*, 2 Bosw. [N. Y.] 188; *Spangler v. Springer*, 22 Penn. St. 454); nor does the rule of "account stated" apply as against a wife in favor of her husband. *Southwick v. Southwick*, 1 Sweeny (N. Y.), 47; S. C. affirmed, 49 N. Y. (4 Sick.) 510. It is applicable, however, to an account rendered by a land agent, if received and not objected to for

many years; such a case not being within the exception established with respect to persons holding confidential relations to each other. *Philips v. Belden*, 2 Edw. Ch. (N. Y.) 1. See *Holmes v. Morse*, 50 Me. 102.

§ 6. **Conclusiveness.** To entitle a plaintiff to recover it has been held sufficient if he prove the account stated, and this was formerly conclusive. *Bartlett v. Emery*, 1 Term R. 42, note. But in modern times a greater latitude has prevailed, and errors which may have crept into the account, may now be shown and corrected. *Ib.* *Holmes v. D'Camp*, 1 Johns. 36; *Wilson v. Wilson*, 14 Com. B. (5 J. Scott) 626; *Thomas' Adm'r v. Hawkes*, 8 M. & W. 140. An account *stated* or *settled* is a mere admission that the account is correct. It is not an estoppel. The account is still open to impeachment for mistakes or errors. Its effect is to establish, *prima facie*, the accuracy of the items without other proof; and the party seeking to impeach it is bound to show affirmatively the mistake or error alleged. The force of the admission, and the strength of the evidence which will be necessary to overcome it, will depend upon the circumstances of the case. An account stated, which is shown to have been examined by both parties, and expressly assented to or signed by them, would afford stronger evidence of the correctness of its items than if it merely appeared that it had been delivered to the party, or sent by mail, and acquiesced in for a sufficient length of time to entitle it to be considered as an account *stated*. *Lockwood v. Thorne*, 18 N. Y. (4 Smith) 285, 292; *Champion v. Joslyn*, 44 N. Y. (5 Hand) 653. So, too, an account *settled*, that is, when the balance it exhibits has been paid or adjusted between the parties, is stronger evidence and requires more proof to overcome it than a mere account *stated*. But the parties are never precluded from giving evidence to impeach the account, unless the case is brought within the principle of an *estoppel in pais*, or of an obligatory agreement between the parties; as for instance where, upon a settlement, mutual compromises are made. *Lockwood v. Thorne*, 18 N. Y. (4 Smith) 285; *Kock v. Bonitz*, 4 Daly (N. Y.), 117, 120; and see *Lockwood v. Thorne*, 11 N. Y. (1 Kern.) 170; *Stenton v. Jerome*, 54 N. Y. (9 Sick.) 480; *Bucklin v. Chapin*, 1 Lans. (N. Y.) 443, 447; *Keane v. Branden*, 12 La. Ann. 20; *Jones v. Dunn*, 3 Watts & S. (Penn.) 109; *Hutchinson v. Market Bank of Troy*, 48 Barb. 302. See *Schettler v. Smith*, 34 N. Y. Super. Ct. 17. A stated account, which is binding on the original parties, is also binding on a guarantor. *Bullock v. Boyd*, 2 Edw. Ch. 293.

Where a balance is struck by the parties, after a hearing before referees has commenced, which is reported to the referees and entered by them upon their minutes, the parties are held to be concluded by it. *Clark v. Fairchild*, 22 Wend. 576. So, where an "account settled" is relied on, by way of plea or answer to a bill in equity for an account, it is conclusive, unless the plaintiff can allege and prove some fraud or mistake. *Costin v. Baxter*, 6 Ired. Eq. (N. C.) 197. And where a party stated an account, which he sent to the other by a messenger, with his check for the balance, the party receiving the check and obtaining the money thereon, was held bound, although he objected at the time, that the balance was too small. *Davenport v. Wheeler*, 7 Cow. 231.

It is held to be no bar to an action on an account stated, that the defendant's indebtedness was for liquors sold by plaintiff on Sunday, contrary to law, if the account was not stated on Sunday. But if the sale was illegal for want of a license, the action on an account stated could not be maintained. *Melchoir v. McCarty*, 31 Wis. 252; S. C., 11 Am. Rep. 605; see, also, *Kennedy v. Brown*, 13 J. Scott (N. S.), 677; *Dunbar v. Johnson*, 108 Mass. 519.

§ 7. **Opening account.** When the parties have adjusted an account, struck a balance, and agreed upon the amount due, courts are exceedingly unwilling to open it again, unless there has been fraud, or it is very clear that there has been a mistake. *Kock v. Bonitz*, 4 Daly, 117. For "no practice could be more dangerous than that of opening accounts which the parties have themselves adjusted, on suggestions supported by doubtful, or by only probable testimony." Chief-Justice MARSHALL, in *Chapdelaine v. Dechenaux*, 4 Cranch, 306. And see *McIntyre v. Warren*, 3 Abb. Ct. App. 99; *Wilde v. Jenkins*, 4 Paige, 481.

If, however, there has been any mistake, omission, accident, fraud, or undue advantage, by which an account stated is in truth vitiated, and the balance incorrectly stated, equity will permit it to be opened and re-examined *in toto*, or as to particular items, as the allegations may warrant. *Farnam v. Brooks*, 9 Pick. 212; *Roberts v. Totten*, 13 Ark. 609; *Rembert v. Brown*, 17 Ala. 687; *Bankhead v. Alloway*, 6 Coldw. (Tenn.) 56; *Chatham v. Niles*, 36 Conn. 403; *La Trobe v. Hayward*, 13 Fla. 190; *Shirks' Appeal*, 3 Brewst. (Penn.) 119; *Kronenberger v. Binz*, 56 Mo. 121. And it is held that when there has been fraud, a court of equity will open and examine accounts after any length of time, even though the person committing the fraud be dead. *Bolifeur v. Weyman*, 1 McCord (S. C.), 156. So usurious charges in a stated

account will be corrected in equity, and relief seems open until a judgment has been obtained, or an award made and performed. *Bullock v. Boyd*, Hoffm. Ch. (N. Y.) 294. An account *settled* by bond or release may be opened for fraud or collusion, or where the settlement was made under suspicious circumstances (*Kelsey v. Hobby*, 16 Pet. 269; *Love v. White*, 4 Hayw. [Tenn.] 210); but in such case the burden of proof is upon the complainant. *Ib.*

It is said that a *settled* account between client and attorney, or between other persons standing in confidential relations to each other, will be more readily opened than any others. See Story's Eq. Plead., § 800; *Philips v. Belden*, 2 Edw. Ch. 1; *Rembert v. Brown*, 17 Ala. 667. But an account *settled* between partners will not be reopened by a court of equity in absence of proof of fraud, misrepresentation, or denial of access to the books. *Shirks' Appeal*, 3 Brewst. (Penn.) 119. In opening a *settled* account, the correction of errors is sometimes allowed on both sides. *Floyd v. Priester*, 8 Rich. Eq. (S. C.) 248.

A stated account will not be opened, where it appears that the plaintiff has been guilty of negligence in detecting the errors he has discovered. *Bruen v. Hone*, 2 Barb. 586. So, after the lapse of twenty years, it is held too late to open a settlement of accounts, upon the ground of *inadvertency*, when both parties knew their rights. *Hutchins v. Hope*, 7 Gill. (Md.) 119. See *Gregory v. Forrester*, 1 McCord (S. C.), 332. And, where a party not standing in the relation of trustee, in stating his claim, omits to give his debtor a credit for a payment made, and they settle, the debtor cannot, after the lapse of six years, open the account, on the ground that he has but recently discovered the mistake. *Randel v. Ely*, 3 Brewst. (Penn.) 270. And see *George v. Johnson*, 42 N. H. 456; *Ogden v. Astor*, 4 Sandf. (N. Y.) 311.

A mistake in law is no ground for opening a settled account. *Commissioners, etc., v. Gherky*, Wright (Ohio), 493. Nor will a stated account be readily opened after the defendant's books have been casually destroyed, as by fire. *Bruen v. Hone*, 2 Barb. (N. Y.) 586. So after judgment and execution, and sale under a mortgage, the account will not be opened, although it appears to be irregular. *Bloodgood v. Zeily*, 2 Caines (N. Y.), 124. And where one of the parties goes over the account in the presence of the other, and finds a certain balance due, which is not objected to by the other party, it becomes an account stated, and can only be opened on proof of fraud or mistake. *Kock v. Bonitz*, 4 Daly, 117.

A court of equity will not open accounts and sustain claims which are barred by the statute of limitations, without exercising great caution. *Stearns v. Page*, 7 How. (U. S.) 819. And lapse of time will be allowed to protect delinquents where the transaction is old, the accounts unsettled, and the amount sought to be recovered uncertain, or when, from the death of parties, all knowledge of the true state of the accounts has passed into oblivion, and when any attempt to settle and adjust the accounts would probably result in great injustice to the defendant. *Winston v. Street*, 2 Patt. & H. (Va.) 169. See *Dakin v. Demming*, 6 Paige, 95; *Dexter v. Arnold*, 2 Sumn. 108; *Atwood v. Fowler*, 1 Edw. Ch. 417.

An account stated, which has been acquiesced in for a number of years, without objection, will not be opened (in the absence of all pretense of fraud or imposition), except upon conclusive evidence of error or mistake; and the party who seeks to open a settlement of accounts, on the ground of mistake, assumes the burden of proving distinctly wherein the mistake consisted, and of furnishing the data, by which it may be corrected. *Towsley v. Denison*, 45 Barb. 490; *Chubbuck v. Vernam*, 42 N.Y. (3 Hand) 432; *Burke v. Isham*, 3 Alb. Law Jour. 209; S.C., 53 N.Y. (8 Sick.) 631; *McIntyre v. Warren*, 3 Abb. Ct. App. (N.Y.) 99; *Herrick v. Ames*, 1 Keyes (N. Y.), 190. See *Sutphen v. Cushman*, 35 Ill. 186; *Dakin v. Demming*, 6 Paige, 95; *Kronenberger v. Binz*, 56 Mo. 121.

When fraud is proved, it will be a sufficient ground to open the whole account. *Brown v. Vandyke*, 8 N. J. Eq. 795; *Bruen v. Hone*, 2 Barb. (N. Y.) 586. So it is held, that the whole account may be taken *de novo*, for gross mistake in some cases. *Branger v. Chevalier*, 4 Cal. 353. But this can only be done where such a mistake or error affects all the items of the transaction. *Ib.* Generally, where errors or mistakes only are shown to exist in the account, it will not be opened, but the party will merely be permitted to surcharge and falsify it. *Bruen v. Hone*, 2 Barb. 586; *Gover v. Hall*, 3 Harr. & J. (Md.) 43; *Bullock v. Boyd*, 2 Edw. Ch. (N. Y.) 293; S. C., again, 1 Hoffm. 294. And the mistake or error must be distinctly alleged. *Ib.*

Accounts having been stated between the parties, without fraud or coercion, and the statements being accompanied with written agreements, showing how far they should be binding, and for what cause they should be varied, the accounts will be opened so far only as is provided for by the terms of such agreements. *Troup v. Haight*, Hopk. Ch. (N. Y.) 239.

CHAPTER VI.

OF AN ACTION FOR ADULTERY.

ARTICLE I.

OF THE ACTION IN GENERAL.

Section 1. Marriage must be proved. Adultery, at the common law, is considered merely as a civil injury, for which the only remedy afforded by the courts against the adulterer is a civil action for the recovery of compensation in damages. The grounds of this action are, the injuries sustained by the husband in the alienation of his wife's affections, the destruction of his comfort in her society, and by compelling him to raise and support children not his own. *Wilton v. Webster*, 7 Carr. & P. 198; *Smith v. Masten*, 15 Wend. 270. And the action may be maintained by the injured husband, after the dissolution of a valid marriage, for debauching the wife while the coverture existed. *Dickerman v. Graves*, 6 Cush. (Mass.) 308; *Ratcliff v. Wales*, 1 Hill (N. Y.), 63.

But it has long been settled, that in an action for criminal conversation, an *actual marriage* must be proved. *Morris v. Miller*, 4 Burr. 2057; *Birt v. Barlow*, 1 Doug. 170; *Fowler v. Reed*, 4 Johns. 53; *People v. Humphrey*, 7 id. 314; *Kibby v. Rucker*, 1 Marsh. (Ky.) 391. The cohabitation of the parties as man and wife, their declaration or admissions, or the reputation of an existing marriage, or the plaintiff's acknowledgment of the woman as his wife, and holding her out as such to his friends and acquaintances, and her reception in the family as such, are not sufficient to maintain the suit. *Ib.* *Dann v. Kingdom*, 1 S. C. N. Y. (T. & C.) 492. If, however, the defendant has seriously and solemnly admitted the marriage, it will be received as sufficient proof of the fact. *Forney v. Hallacher*, 8 Serg. & R. (Penn.) 159; *Rigg v. Curgenvon*, 2 Wils. 399. And it is sufficient to prove the marriage according to *any form of religion*, as Jews, Quakers, and the like. See Bull. N. P. 28; 2 Greenl. Ev., § 49.

§ 2. The husband must be without fault. To maintain the action for adultery, it is essential that the husband should present

himself in court with clean hands; that is, without having courted his own dishonor, or having been instrumental to his own disgrace. For, if he has consented to, or otherwise connives at, the adulterous intercourse of his wife with the defendant, it takes away the ground of the action. *Duberly v. Gunning*, 4 Term R. 651; *Bunnell v. Greathead*, 49 Barb. 106; *Rea v. Tucker*, 51 Ill. 110. But the ground of the action is not removed by the mere negligence, inattention, confidence or dullness of apprehension of the husband; there must be passive acquiescence and consent, with the intention and in the expectation that guilt will follow. *Ib.* *Travis v. Barger*, 24 Barb. 614, 624; *Bromley v. Wallace*, 4 Esp. 237. The rule of law is stated to be, that the plaintiff will be entitled to recover, unless he has, in some degree, been a party to his own dishonor, either by giving his wife a general license to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with the defendant, or by having totally and permanently given up all the advantage to be derived from her society. *Winter v. Henn*, 4 Carr. & P. 494. Where a wife is suffered to live as a prostitute with the privity of the husband, and the defendant has thereby been drawn in to commit the act of which the husband complains, the action cannot, of course, be maintained. See *Smith v. Allison*, Bull. N. P. 27; *Sanborn v. Neilson*, 4 N. H. 501; *Hodges v. Windham* 1 Peake, 54.

§ 3. **Separation by agreement.** As the gist of the action for adultery is the loss of the comfort and society of the plaintiff's wife, it was held to follow, that if the husband voluntarily separated himself from his wife, it could not be said that he was deprived of that comfort and society which he had himself renounced; and that he could not, therefore, maintain the action. *Weedon v. Timbrell*, 5 Term R. 357; *Fry v. Derstler*, 2 Yeates (Penn.), 278. But this doctrine is questioned, and it is held that a deed of separation may not preclude the action; especially where such deed contains a provision for the attendance and care of the mother as it regards her children. The husband, in such a case, does not relinquish all claim to the comfort and assistance of the wife. *Chambers v. Caulfield*, 6 East, 244; S. C., 2 J. P. Smith, 356.

§ 4. **Ill treatment of wife.** Evidence of the husband's cruelty toward his wife, as turning her out of his house, refusing to maintain her, etc., previously to the adulterous intercourse, is admissible in mitigation of damages, in an action for the seduc-

tion of the wife, but it does not go in bar of such an action. *Coleman v. White*, 43 Ind. 429; *Palmer v. Crook*, 7 Gray, 418.

§ 5. **Husband living in adultery.** It has been ruled in some of the early English cases, that if the husband, after marriage, transgressed those rules of conduct which decency requires and affection demands from him, and in an open, notorious and undisguised manner, carried on a criminal correspondence with other women, he could not maintain an action for the seduction of his wife. *Wyndham v. Lord Wycombe*, 4 Esp. 16; *Sturt v. Marquis of Blandford*, id., cited. But in a subsequent case it was held that the infidelity or misconduct of the husband could never be set up as a bar, but only in mitigation of damages. *Promley v. Wallace*, 4 Esp. 237; and such is now the firmly established doctrine recognized by the courts. *Sanborn v. Neilson*, 4 N. H. 501; *Smith v. Masters*, 15 Wend. 270; *Bunnell v. Greathead*, 49 Barb. 106; *Shattuck v. Hammond*, 46 Vt. 466; S. C., 14 Am. R. 631.

§ 6. **Condonation.** Cohabitation by the husband with the wife, after knowledge of her adultery, operates as a forgiveness of her wrong, but is not a bar to an action against her seducer for damages. *Verholf v. Van Hourvenlengen*, 21 Iowa, 421. Such cohabitation, though not proof, seems to be evidence of collusion. *Ib.*

§ 7. **Proof of the offense.** Proofs of the offense must, in many cases, be to a great extent presumptive. The fact of adultery is inferred from circumstances that lead to it by fair inference as a necessary conclusion. *Loveden v. Loveden*, 2 Hagg. Con. 2. Real and direct proof of the fact is to be expected in but a few cases; therefore, the question will be, whether there is evidence of such near, such approximate acts, that there must be a legal presumption of the adultery. See *Williams v. Williams*, 1 Hagg. Con. 299; *Wood v. Wood*, 4 Hagg. Ecc. 138, *n.* Thus, *general cohabitation* has been held sufficient to establish the fact of adultery. *Cadogan v. Cadogan*, 2 Hagg. Con. 4; *Rutton v. Rutton*, id. 6, *n.* So, an adulterous disposition of the parties having been proved, the offense may be inferred from their subsequently being found together in a bedroom, under circumstances justifying the inference. *Van Epps v. Van Epps*, 6 Barb. 320; *Soilleaux v. Soilleaux*, 1 Hagg. Con. 373; *State v. Green*, Kirb. (Conn.) 87. See *Matchin v. Matchin*, 6 Barr (Penn.), 332. But when the facts relied upon are equally capable of two interpretations, one of which is consistent with the defendant's innocence, they will not warrant a verdict against him. *Ferguson*

v. *Ferguson*, 3 Sandf. (N. Y.) 307. See *Kirby v. The State*, 3 Humph. (Tenn.) 289; *Homburger v. Homburger*, 46 How. (N. Y.) 346; *A. A. C. v. T. C.*, 25 id. 432, 435.

Neither the confessions of the wife, nor the opinions of witnesses concerning her fondness for the defendant are admissible in evidence against him. *Mc Vey v. Blair*, 7 Ind. 590. But conversations between her and the defendant may be given in evidence. *Winsmore v. Greenbank*, Willes, 577. And in an action brought by a husband for criminal conversation with his wife, the latter, after a divorce from the bonds of matrimony, is a competent witness for the plaintiff, to prove the charge laid. *Ratcliff v. Wales*, 1 Hill (N. Y.), 63; *Dickerman v. Graves*, 6 Cush. 308; *Carpenter v. White*, 46 Barb. 291. But while the coverture exists she is not a competent witness for her husband in such an action. *Ib.* *Hicks v. Bradner*, 2 Abb. Ct. App. (N. Y.) 362; S. C., 35 How. 118; 5 Trans. App. 239; and see *Rivenburgh v. Rivenburgh*, 47 Barb. 419. *Letters written to the wife by the defendant are evidence *against* him: but the wife's letters to the defendant are not evidence *for* the defendant against the husband. Bull. N. P. 28. As a general rule, the wife's letters to the husband are not admissible in evidence for him against the defendant. See *Wilton v. Webster*, 7 Carr. & P. 198. An exception to this rule is where the letters have been written by her during an absence from her husband, before any suspicion of her misconduct, and are offered as evidence of her disposition toward him. *Edwards v. Crock*, 4 Esp. 39; *Trelawny v. Coleman*, 1 Barn. & Ald. 30; S. C., 2 Stark. 191. So in an action of *crim. con.*, letters written by the wife to *third persons* before she became acquainted with the defendant, and in which she mentioned her husband, are admissible in evidence to show the state of her feelings. *Willis v. Bernard*, 8 Bing. 376; S. C., 5 Carr. & Payne, 341; 1 Moore & Scott, 584.

In an action for criminal conversation with the plaintiff's wife, at a time named within the statutory period of limitation for such actions, evidence of prior acts of adulterous intercourse, upon which the statute has run, is admissible for the purpose of showing the intimate relations of the parties, and of corroborating the evidence introduced to establish the illicit act which is within the statute, and upon which a recovery is sought. *Conway v. Nichols*, 34 Iowa, 533; *Duke of Norfolk v. Germaine*, 12 How. St. Tr. 929, 945; *Commonwealth v. Lohey*, 14 Gray, 91; *Commonwealth v. Meriam*, 14 Pick. 518. It has, however, been

* But see *Laws N. Y. 1876*, ch. 426, § 1.

held, that the proof of acts within the period must first be adduced. *Gardiner v. Madeira*, 2 Yeates (Penn.), 466.

Contrary to the general rule of evidence as to matters of opinion, *impression and belief* are held competent by the ecclesiastical courts in cases of adultery *Crewe v. Crewe*, 3 Hagg. Ecc. 128.

§ 8. **Damages.** The damages given by the jury in a civil action for adultery should, in general, be proportioned to the degree of injury sustained by the husband; but the court will not interfere with their estimates of damages unless the sum given is manifestly and palpably outrageous. *Duberly v. Gunning*, 4 Term R. 657; *Wilford v. Berkeley*, 1 Burr. 609; *Smith v. Masten*, 15 Wend. 270. Circumstances of aggravation of the injury, which may be properly considered by the jury, are, the unblemished character and antecedent virtuous behavior of the wife; the state of domestic happiness in which the plaintiff and his wife had previously lived; a marriage settlement, or other provision for the children of the marriage; the relationship subsisting between the plaintiff and the defendant; or, circumstances attending the intercourse of the parties. These, and other similar topics are for the proper and sole cognizance of the jury. See Bull. N. P. 27; 1 Steph. N. P. 24; *Duke of Norfolk v. Germaine*, 12 How. St. Tr. 927; *Wilford v. Berkely*, 1 Burr. 609. So it has been said that the rank and circumstances of the plaintiff may be given in evidence by him. See 2 Stark. on Ev., part iv, 442. But this has been denied; for the character of the *husband* is not in issue, except merely as far as that relation is concerned. *Norton v. Warner*, 6 Conn. 172. And upon this point it has been remarked, that "it would seem that the same principle which accords to the plaintiff the right to show, in aggravation of damages, his rank and quality, would entitle the defendant to show the *same* in mitigation. It would be but bringing him to the test of a scale that is graduated both ways from the zero of indifference. If his rank marks *plus* with reference to that point, he has the benefit in due proportion; if *minus*, he should, by the same rule and reason, be subjected to the resulting disadvantage in like proportion." BARRET, J., in *Shattuck v. Hammond*, 46 Vt. 466; S. C., 14 Am. Rep. 631. See *Rea v. Tucker*, 51 Ill. 110, which holds that evidence is admissible to show the condition in life and the pecuniary circumstances of the respective parties.

The circumstances in extenuation, to reduce the amount of damages, will vary with every varying case. See *Calcroft v.*

Harborough, 4 Carr. & P. 490; *Winter v. Henn*, id. 494. The defendant may show, in *mitigation of damages*, the previous bad character and conduct of the wife, whether in general, or in particular instances of unchastity (*Conway v. Nichol*, 34 Iowa, 533; *Harrison v. Price*, 22 Ind. 165); or that she made the first advances of a criminal nature toward him (*Coote v. Bertz*, 12 Mod. 232), and for this purpose the wife's letters to the defendant may be given in evidence. *Elsam v. Fawcett*, 2 Esp. 562. So the defendant may prove, in mitigation of damages, the plaintiff's criminal connection with other women at any time after marriage and before trial. *Shattuck v. Hammond*, 46 Vt. 466; S. C., 14 Am. Rep. 631. For, if the plaintiff was in the habit of improper intimacy with other women, his sense of moral propriety, and a regard for chastity, could not be much offended by the loss of virtue in his wife. The guilt of the defendant is not diminished, but the plaintiff has sustained less damage. The *merits* of the plaintiff, but not the *demerits* of the defendant, are less. Both, however, are considered by the jury in forming their verdict, and all circumstances which diminish the one, or enhance the other, are proper subjects for their consideration. SAVAGE, C. J., in *Smith v. Masten*, 15 Wend. 270, 273. Circumstances which show that the plaintiff possessed no comforts of a domestic character, are proper to be given in evidence, in mitigation of damages. The defendant cannot, with any propriety, be chargeable with destroying the plaintiff's domestic comfort, when he had never enjoyed such comfort. *Ib.* *Jones v. Thompson*, 6 C. & P. 415; *Winter v. Wroot*, 1 M. & Rob. 404; *Trelawny v. Coleman*, 2 Stark. 191.

If the wife dies, pending an action for adultery, the jury should give damages for the loss of the society of the wife from the time of the discovery of the adultery to the time of her death, and also for the shock to the feelings of the husband; and this, although there was no suspicion of the wife's infidelity till she was on her death-bed, and the husband continued to treat her kindly up to the time of her death. *Wilton v. Webster*, 7 Carr. & P. 198.

In a case where the wife of the plaintiff had not been criminally connected with the defendant alone, the jury were directed to award damages proportioned to so much of the plaintiff's loss of comfort, etc., as they might suppose to have been occasioned by the defendant's misconduct, and not to give damages for the whole of the injury that the plaintiff had sustained. *Gregson v. Theaker*, 1 Campb. 415, *n.*

CHAPTER VII.

ADVANCEMENT.

ARTICLE I.

GENERAL RULES RELATING TO ADVANCEMENT.

Section 1. What is. An advancement, properly speaking, is a gift by a parent to his child, by anticipation, in whole or in part, of what it is supposed the child would be entitled to on the death of the parent. *Cawthon v. Coppedge*, 1 Swan. (Tenn.) 487; and see *Osgood v. Breed*, 17 Mass. 358; *Christy's Appeal*, 1 Grant's Cas. (Penn.) 369; *Grattan v. Grattan*, 18 Ill. 167; *Chase v. Ewing*, 51 Barb. 597, 612; *Yundt's Appeal*, 1 Harris (Penn.), 575; *Eshleman's Appeal*, 74 Penn. St. 42. Equality is equity amongst heirs, and the doctrine of advancement has, for its object, the furtherance of this end. *Miller's Appeal*, 31 Penn. St. 337. It is said that an advancement is to be treated as "purely an irrevocable gift." *Ib.* *Hight's Appeal*, 21 id. 283; *Crosby v. Covington*, 24 Miss. 619; *Grey v. Grey*, 22 Ala. 233; *O'Brien v. Shiel*, 7 Ir. R. Eq. 255. But, although it cannot be doubted that every advancement is a gift, it is also true that there may be gifts which are not advancements. *Sanford v. Sanford*, 61 Barb. 293, 299; S. C., 5 Lans. 486. And the question whether a voluntary transfer of property by a father to a child is to be treated as an absolute gift, or as an advancement upon the child's portion of the father's estate, is one of intention. The intention of the donor, as indicated by all the circumstances attending the gift, decides its effect. *Harris' Appeal*, 2 Grant's Cas. (Penn.) 304; *Meeker v. Meeker*, 16 Conn. 383; *Johnson v. Belden*, 20 id. 322; *Weaver's Appeal*, 63 Penn. St. 309; *Youngblood v. Norton*, 1 Strobb. Eq. (S. C.) 122; *Lawson's Appeal*, 23 Penn. St. 85; *McCaw v. Blewit*, 2 McCord's Ch. (S. C.) 103; and a gift made absolutely, cannot by subsequent acts or declarations be changed to an advancement. *Lawson's Appeal*, 23 Penn. St. 85. See *Sherwood v. Smith*, 23 Conn. 516.

A conveyance to a child either directly or by a payment of the purchase-money for land, and having the deed made to the child, is *prima facie* an advancement. *Weaver's Appeal*, 63 Penn. St.

309. But to constitute an advancement, it is not requisite that the provision should take effect in the father's life-time. If, by deed, he gives property to one of his children, to be possessed and enjoyed after his death, and not before, it is an advancement. *Hook v. Hook*, 13 B. Monr. (Ky.) 526. Necessary outfit for a plantation, furnished to a child on his commencing life for himself, has been held an advancement. *Shiver v. Brock*, 2 Jones (N. C.), 137. See *Sanford v. Sanford*, 61 Barb. 294. And where a gift was made to the husband during coverture, and a cancellation of bonds of the husband was made, for the purpose of advancing his wife, the child of the obligee, they were held to be advancements on behalf of the wife. *Bridgers v. Hutchins*, 11 Ired. (N. C.) 68; and see *Dittoe v. Cluney*, 22 Ohio St. 436. So the gift of a life-estate may be an advancement. *Carveth v. Coppedge*, 1 Swan. (Tenn.) 487.

There is generally to be found in the statute laws of the several States a provision relative to real and personal estates, concerning an advancement to a child, and the statutes of the particular State should be examined.

§ 2. **What is not an advancement.** An advancement creates no debt to the person making it, and in all its features, and in its very nature, is distinguishable from a debt or indebtedness. *Chase v. Ewing*, 51 Barb. 597; *Luqueer's Estate*, 1 Tuck. (N. Y.) 236. And where money is lent or paid by a father to or for a son, at the request of the latter, and an account is stated by the father and interest charged, such loan or payment is not an advancement, but constitutes an indebtedness. *Harris' Appeal*, 2 Grant's Cas. (Penn.) 304; and see *Denman v. Mc Mahan*, 37 Ind. 241. So money charged by a parent against a child, in the ordinary form of account-books, is not to be treated as an advancement. *Ashley's Case*, 4 Pick. 21; see, also, *Proctor v. Newhall*, 17 Mass. 93; *Osgood v. Breed*, id. 359; *Fellows v. Little*, 46 N. H. 27; *Vaden v. Hance*, 1 Head (Tenn.), 300. And when a father is indebted to his children, and gives them property or money at their maturity or marriage, the presumption is that this is a payment of the debt, and not an advancement. *Hagler v. McCombs*, 66 N. C. 345. It is held, however, that a testator has power to convert the indebtedness of his children into advancements, by will. *Green v. Howell*, 6 Watts & S. (Penn.) 203; but see *Dewee's Estate*, 3 Brewst. (Penn.) 314; S. C., 7 Phil. 498.

Trifling gifts ought not to be charged as advancements. *Mitchell v. Mitchell*, 8 Ala. 414; *Meadows v. Meadows*, 11 Ired.

L. (N. C.) 148; *Sanford v. Sanford*, 61 Barb. 293; 5 Lans. 486. So a gift for the purpose of pleasure or amusement, merely, as of a saddle horse, or a buggy, is not considered an advancement. *McCaw v. Blewit*, 2 McCord's Eq. Ch. (S. C.), 90; *Ison v. Ison*, 5 Rich. Eq. (S. C.) 15. But the gift of a stallion to be employed as a foal-getter and for profit, is an advancement. *Ib.* A gift to a grandchild is deemed to be a gift absolute, rather than an advancement. *Shiver v. Brock*, 2 Jones (N. C.), 137. See *Thomas v. Capps*, 5 Bush (Ky.), 273. And, as a general rule, money expended in the maintenance and education of a child is not to be deemed an advancement. *Riddle's Estate*, 19 Penn. St. 431; *Mitchell v. Mitchell*, 8 Ala. 414. See *Johnson v. Belden*, 20 Conn. 326; *Cooper v. Wray*, 3 Strobb. Eq. (S. C.) 185. But if the intention of the parent appears to have been to make an advancement, the expenditure will be so treated. *Ib.* *Miller's Appeal*, 40 Penn. St. 57.

§ 3. **In what made.** An advancement may be made in money, in personal property, or in real estate. Advancements in personal property may be made by the delivery thereof. See *Autrey v. Autrey*, 37 Ala. 614; *McCaw v. Blewit*, 2 McCord's Ch. (S. C.) 90, 103; *Shiver v. Brock*, 2 Jones' Eq. (N. C.) 137. And in real estate by conveyance. See *Dutch's Appeal*, 57 Penn. St. 461; *Brown v. Burke*, 22 Ga. 574; *Temper v. Barton*, 18 Ohio, 418; *Hatch v. Straight*, 3 Conn. 31. Under the law of New Jersey, it is held that an advancement in money, made by a father in his life-time, to one of his sons, cannot have any effect upon the share of the real estate of the father, which, at his death, descends to the son. Only advancements or settlements in land can have such effect. *Havens v. Thompson*, 23 N. J. Eq. 321:

§ 4. **To whom made.** Generally, an advancement is confined to the child of the parent. See 4 Kent's Com. 419; *Shiver v. Brock*, 2 Jones (N. C.), 137; *Skinner v. Wynne*, *id.* 41. But, by statute in some of the States, as Maine, Vermont, Massachusetts and Kentucky, provision as to advancements is made to apply equally to grandchildren. See *Barber v. Taylor's Heirs*, 9 Dana (Ky.), 85; *Porter v. Porter*, 51 Me. 376. See, also, *Sayles v. Baker*, 5 R. I. 457; *Law v. Smith*, 2 *id.* 244; *McLure v. Steele*, 14 Rich. Eq. (S. C.) 105. See *post*, § 7.

§ 5. **From whom.** That an advancement, properly speaking, can be made only by a parent, see *Cawthon v. Coppedge*, 1 Swan. (Tenn.) 487; *Osgood v. Breed*, 17 Mass. 358; *Chase v. Ewing*, 51 Barb. 597. See *post*, § 7.

§ 6. **Value of.** It is the general rule, in settling the rights of parties interested in an estate, that advancements are to be estimated at their value *when they were given*, or when the grantees came into possession of them; and not at the time of the testator's death, or at that of the settlement. *Jackson v. Jackson*, 28 Miss. 674; *Grattan v. Grattan*, 18 Ill. 187; *Burton v. Dickinson*, 3 Yerg. (Tenn.) 112; *Hook v. Hook*, 13 B. Monr. (Ky.) 526; *Clark v. Wilson*, 27 Md. 693. Though in some cases it is held that advancements may be estimated according to their value at the death of the testator. *Thomas v. Gage*, 1 Harp. Ch. (S. C.) 197; *Miller's Appeal*, 31 Penn. St. 337.

§ 7. **Presumptions.** Where a man purchases land in the name of another, and pays the consideration money, it is stated to be a presumption of law that the purchase is intended for the benefit of the purchaser, and that the conveyance is taken in trust for him. See *Jackson v. Moore*, 6 Cow. 706; *Steere v. Steere*, 5 Johns. Ch. 1; 4 Kent's Com. 305, 306. If, however, the conveyance is taken in the name of a person for whom the purchaser is under an obligation to provide, the purchase will be deemed, *prima facie*, a *provision or advancement*, so as to rebut the provision of a resulting trust. Thus, the general rule of equity is, that if a father makes a purchase in the name of a son, even though illegitimate, it will not be deemed a resulting trust, but an advancement. *Page v. Page*, 8 N. H. 187. And see *Stanley v. Brannon*, 6 Blackf. (Ind.) 193; *Welton v. Divine*, 20 Barb. 9; *Partridge v. Havens*, 10 Paige, 618; *Brown v. Burk*, 22 Ga. 574; *Butler v. Merchants' Ins. Co.*, 14 Ala. 777; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9; *Jackson v. Matsdorf*, 11 Johns. 91; *Dutch's Appeal*, 57 Penn. St. 461. So it seems that when a parent conveys land to his child, without asking or receiving any consideration therefor, the presumption is that it is an advancement to the child, though the deed recites a money consideration, and contains an acknowledgment of the payment of it. *Sanford v. Sanford*, 61 Barb. 293; S. C., 5 Lans. 486. And where a husband voluntarily conveys real estate to his wife, the presumption is, that no trust arises in his favor, but that the conveyance is intended as a provision or advancement. *McCaw v. Burk*, 31 Ind. 56; *Spring v. Highl*, 22 Me. 408; *Astreen v. Flanagan*, 3 Edw. Ch. 279; *Whitten v. Whitten*, 3 Cush. 194. See *Renaker v. Lafferty*, 5 Bush (Ky.), 88. The doctrine under consideration has been held applicable to purchases made by a *mother*. *Murphy v. Nathans*, 46 Penn. St. 508. And see *Smith v. Smith*, 21

Ala. 76; *Dennison v. Goehring*, 7 Penn. St. 182, *n*; *Partridge v. Havens*, 10 Paige, 618; *Creed v. Lancaster Bank*, 1 Ohio St. 1. But see, *contra*, *Re De Visme*, 2 De G., J. & Sm. 17.

Where securities are taken in the name of a child, the presumption is, that it is intended as an advancement (*Riker v. Kidder*, 10 Ves. 366; S. C., 2 Mad. 101); and so of securities taken by a husband in the name of his wife. *Whitten v. Whitten*, 3 Cush. 194. And, in general, where a gift of money or property is made to a child or heir, by a person who afterward dies intestate, the presumption is, that an advancement was intended. *Hollister v. Attmore*, 5 Jones' Eq. (N. C.) 373; *Grattan v. Grattan*, 18 Ill. 167; *Dillman v. Cox*, 23 Ind. 440; *Autrey v. Autrey*, 1 Ala. Sel. Cas. 542; *Mitchell v. Mitchell*, 8 id. 414. And see *Weaver's Appeal*, 63 Penn. St. 309. So, where the debt of a child is paid by the father, in the absence of proof to the contrary, such payment will be presumed by the law to be an advancement. *Johnson v. Hoyle*, 3 Head (Tenn.), 56. And where it is shown that it was at one time the intention of a decedent to charge his children with certain advancements, the intent is presumed to continue to exist, until the contrary be shown. *Oller v. Bonebrake*, 65 Penn. St. 338.

The presumption of advancement has been held to extend to a grandchild, the father being dead (*Ebrand v. Dancer*, Ch. Ca. 26); and to a wife's nephew (*Currant v. Jago*, 1 Coll. Ch. Ca. 261); but not an illegitimate grandchild (*Tucker v. Burrow*, 2 H. & M. 515), or to a kept woman. *Rider v. Kidder*, 10 Ves. 360.

§ 8. **Parol evidence.** Parol evidence as to the relations and the acts of the parties is admissible to show an advancement. *Parks v. Parks*, 19 Md. 323. See *Parker v. McCluer*, 3 Abb. Ct. App. (N. Y.) 454; 1 Trans. App. 240; 3 Keyes, 318; 36 How. 301; 5 Abb.(N.S.) 97; and an advancement is sufficiently established by a mere preponderance of testimony. *Middleton v. Middleton*, 31 Iowa, 151. So the presumption of advancement is one that may be rebutted in every case by parol evidence. *Tremper v. Barton*, 18 Ohio, 418; *Jackson v. Matsdorff*, 11 Johns. 91; *Dillman v. Cox*, 23 Ind. 440; *Smith v. Smith*, 21 Ala. 761; *Woolery v. Woolery*, 29 Ind. 249. Thus, where a parent purchases land with his own means, in the name of his infant child, it has generally been considered an advancement. But the question is one of intention, each case to be determined by the reasonable presumption arising from all the facts and circumstances connected

with it. To meet and repel the presumption by proof of circumstances showing that an advancement was not intended, is always competent. And when fraud is established, that presumption is effectually repelled. *Bay v. Cooke*, 31 Ill. 336. And see *Brown v. Burke*, 22 Ga. 574; *Hodgson v. Macy*, 8 Ind. 121; *Tremper v. Barton*, 18 Ohio, 418; *Newell v. Newell*, 13 Vt. 24. The same is true in the case of a husband purchasing land in the name of his wife. *Wilson v. Beauchamp*, 44 Miss. 556; *McCaw v. Burk*, 31 Ind. 56. So in the case of a gift of money or personal property, the presumption of an advancement can be rebutted by parol evidence of the donor's declarations at the time of the gift, or by the donee's admissions afterward, or by proof of facts and circumstances from which the intention may be inferred. *Cecil v. Cecil*, 20 Md. 153; *Dillman v. Cox*, 23 Ind. 440; *Smith v. Smith*, 21 Ala. 761; *Christy's Appeal*, 1 Grant's Cas. (Penn.) 369; *Merrill v. Rhodes*, 37 Ala. 449; *Johnson v. Balden*, 20 Conn. 322; *Autrey v. Autrey*, 37 Ala. 614. But parol evidence of declarations by a father, made after the delivery of a deed to a child, explanatory of his intention in executing it, is not admissible to repel a presumption of advancement. *Hatch v. Straight*, 3 Conn. 31; *Bulkeley v. Noble*, 2 Pick. 337. Add declarations of intention to treat an indebtedness as an advancement has been held insufficient to destroy the debt. *Arnold v. Barrow*, 2 Patt. & H. (Va.) 1; *Yundt's Appeal*, 13 Penn. St. 575.

No particular form of words is required to constitute an advancement. If they show that an advancement was intended, it is sufficient. *Bulkeley v. Noble*, 2 Pick. 337. But courts of equity, it is said, will not aid a defectively executed advancement. *Williams v. Mears*, 2 Disney (Ohio), 604.

§ 9. *Hotchpot*. By the term *hotchpot*, as applied in modern law, is to be understood, the throwing of the amount of an advancement made to a particular child in real or personal estate, into the common stock, for the purpose of a more equal division, or of equalizing the shares of all the children. See 4 Kent's Com. 419; 2 Bl. Com. 516, 517; 2 Burr. Dict. 32. In Louisiana, where the civil law prevails, this return of property to the mass of the succession is termed *collation*, and it takes place unless the advancement was declared not to be subject to the collation. See *Destrehan v. Destrehan*, 16 Mart. 557. As a general thing, the subject now under consideration will be found regulated by statute to a great extent, and a few well-recognized principles only will be here stated. Advancements made by an intestate to any

of his children are never brought into hotchpot for the benefit of his widow. *Miller's Estate*, 2 Brewst. (Penn.) 355; *Logan v. Logan*, 13 Ala. 653; *Beavors v. Winn*, 9 Ga. 189; *Kircudbright v. Kircudbright*, 8 Ves. 64; *Jackson v. Jackson*, 28 Miss. 674. The sole view is equality as amongst the children. *Ib.* But, by statute in North Carolina, advancements are to be brought into a distribution for the benefit of the widow. *Davis v. Duke*, 1 Taylor, 213. It is believed to be the general rule on the subject, that if a child refuses to bring his advancement into hotchpot, he thereby relinquishes all interest in the estate as a distributee. *Taylor v. Reese*, 4 Ala. 121; *Grattan v. Grattan*, 18 Ill. 167. See *Phillips v. McLaughlin*, 26 Miss. 592; *Andrews v. Hall*, 15 Ala. 85. But the party advanced does not relinquish his title to the advancement by bringing it into hotchpot. It is brought in merely to see whether it exceeds or falls short of an equal share. *Jackson v. Jackson*, 28 Miss. 674. A legacy will not be brought into hotchpot in any case. *Snelgrove v. Snelgrove*, 4 Desau. (S. C.) 274, 291. So neither rents nor profits of land, given as an advancement, ought to be brought into hotchpot. But it has been held, that if a father permits a child to rent out his land, and receive the rents to his own use, such rents shall be brought into hotchpot as an advancement of personalty. *Williams v. Stonestreet*, 3 Rand. (Va.) 559.

The doctrine of bringing advancements into hotchpot applies only in cases of entire intestacy. *Snelgrove v. Snelgrove*, 4 Desau. (S. C.) 274; *Richmond v. Vanhook*, 3 Ired. Eq. (N. C.) 581; *Newill's Case*, 1 Browne (Penn.), 311; *Newman v. Wilbourne*, 1 Hill's Ch. (S. C.) 10; *Brewton v. Brewton*, 30 Ga. 416. And where a will directs that the whole property of the testator be "disposed of as the law directs," it is deemed a disposition of the estate, and advancements will not be required to be brought into hotchpot as in case of intestacy. *Brown v. Brown*, 2 Ired. Eq. (N. C.) 309. See *Black v. Whitall*, 9 N. J. Eq. 572; *Thompson v. Carmichael*, 3 Sandf. Ch. (N. Y.) 120. If a person gives all his property to his children by will, and afterward acquires real estate, and has a posthumous child, the devisees must bring the devised land into hotchpot, in order to entitle themselves to a share of such estate. *Vance v. Huling*, 2 Yerg. (Tenn.) 135. Under the law of New York it is held, that in no case can a child, born after the making of a will by his father, recover of any brother or sister, born before the will was made, any portion of any advancement his father made in his life-time to

such brother or sister. *Sanford v. Sanford*, 61 Barb. 293, 298; S. C., 5 Lans. 486. See, also, *Gordon v. Barkelew*, 6 N. J. Law (2 Halst.) 94, in which it is held, that a child who has received an advancement cannot be required to pay any thing on account of it to the other children.

§ 10. **Failure of.** There will be no failure of an advancement on account of the parent's indebtedness at the time of making it, provided he has property remaining clearly and abundantly sufficient to satisfy all subsisting debts. *Miller v. Wilson*, 15 Ohio, 108. So, the insolvency of the personal estate of ancestor constitutes, in equity, no objection to bringing an advancement of personalty into *hotchpot* with real estate, or the proceeds of real estate. *Young's Estate*, 3 Md. Ch. 461. An advancement is not affected by lapse of time or limitation. It operates by a legal abstraction of that much from the child's share in the parent's life-time; hence, it is not controlled by the same defenses, such as infancy, limitation, etc., as prevent the recovery of debts. *Hughes' Appeal*, 57 Penn. St. 179.

§ 11. **Interest on.** It is the general rule of law, in the distribution of estates, that advancements shall not bear interest, nor is increase to be charged to the party to whom the advancement was made. *Miller's Appeal*, 31 Penn. St. 337; *Nelson v. Wyan*, 21 Mo. 347; *Hudson v. Hudson*, 3 Rand. (Va.) 117; *Osgood v. Breed*, 17 Mass. 355; *Towler v. Rountree*, 19 Fla. 299; *Harris v. Allen*, 18 Ga. 177; *Krebs v. Krebs*, 35 Ala. 293. Children last paid are, however, entitled to interest from the time when the other children received their shares. *Yundt's Appeal*, 13 Penn. St. 575. And see *McDougald v. King*, 1 Bailey's Ch. (S. C.) 154.

CHAPTER VIII.

AGENCY.

TITLE I.

OF THE GENERAL PRINCIPLES RELATING TO PRINCIPAL
AND AGENT.

ARTICLE I.

OF THE NATURE OF AN AGENCY.

Section 1. In general. So extensive and so varied are the wants of business, in a civilized and commercial society, that individuals are not able to transact all their affairs in person, and, therefore, they are compelled to employ others to assist them. The employer is the principal, and the employed the agent. Every person of full age, who is not under some legal disability, is invested by the law with a general authority to dispose of his own property, to enter into contracts, and to perform acts which relate to or concern his personal rights, interests, duties and obligations. The law does not, as a general rule, require a party to act in proper person ; he may do most acts by the aid of other persons, to whom he may choose to delegate his authority, either generally or specially, for that purpose. But, as exceptional instances, a man cannot make a valid will, or a binding contract of marriage, by or through a discretionary agent. In the extensive intercourse of the present day, the exigencies of trade and commerce, the pressure of professional, official, and other pursuits, the temporary existence of personal illness or infirmity, the necessity of transacting business at the same time in various and remote places, and the importance of securing accuracy, skill, ability and speed in the accomplishment of the great concerns of human life, must require the assistance and labors of other persons, in addition to the immediate superintendence of the party whose rights and interests are to be affected by the results. The general maxims of the law, upon this subject, are "whatever a man *sui juris* may do of himself, he may do by another ;" and, as a correlative, whatever is done by another is deemed to be done by the party himself.

§ 2. **Who may be a principal.** The general rule is, that every person of full age, of sound mind, and not under a legal disability, is capable of becoming either a principal or an agent. This general rule will prevent several classes of persons from becoming principals, and, therefore, infants, married women, idiots, lunatics, and other persons not *sui juris*, are either wholly or partially incapable of appointing an agent. It has been said that an infant may authorize another person to do any act which is for his benefit; but he cannot authorize him to do an act which is to his prejudice. Story on Agency, § 6; *Hurdy v. Waters*, 38 Me. 450; *Whitney v. Dutch*, 14 Mass. 463; *Hastings v. Dollarhide*, 24 Cal. 195. But the authorities generally hold, that an infant is legally incapable of appointing an agent. *Trueblood v. Trueblood*, 8 Ind. 196; *Lawrence v. McArter*, 10 Ohio, 37, 42; *Bennet v. Davis*, 6 Cow. 393; *Waples v. Hastings*, 3 Harr. 403. See 1 Am. Lead. Cas. 304-306, 5th ed.

There are cases which hold that married women are not capable in some cases of appointing an agent or attorney. But, at the present day, the tendency is to extend the powers and rights, as well as the duties and liabilities of married women. In some of the States a married woman is regarded in the same light as an unmarried female, so far as the rights of property are concerned; and she may become the owner of property by descent, devise, gift, or purchase, and may deal generally with it as her own. And, in such cases, she may employ another to act for her in relation to her property, even by appointing her husband as her agent. *Knapp v. Smith*, 27 N. Y. (13 Smith) 277; *Woodworth v. Sweet*, 51 N. Y. (6 Sick.) 8; *Rowell v. Klein*, 44 Ind. 291; *McLaren v. Hall*, 26 Iowa, 297. Before the abolition of slavery, a master might have employed his slave as an agent. *The Governor v. Daily*, 14 Ala. 469; *Chastain v. Bowman*, 1 Hill (S. C.), 270.

§ 3. **Who may be an agent.** Inasmuch as the law regards the acts of an agent as the acts of his principal, there are few persons who may not act as agents for a competent principal, even though they may not be competent to act for themselves. And, therefore, infants, married women, persons attainted, outlawed or excommunicated, villeins, slaves, and aliens, may act as agents for others. A wife may act as the agent for her husband. *Hopkins v. Mollineux*, 4 Wend. 465; *Edgerton v. Thomas*, 9 N. Y. (5 Seld.) 40; *Marselis v. Seaman*, 21 Barb. 319; *Pickering v. Pickering*, 6 N. H. 124; *Felker v. Emerson*, 16 Vt. 653; *MacKinley*

v. McGregor, 3 Whart. 369; *Singleton v. Mann*, 3 Mo. 465; *Cantrell v. Colwell*, 3 Head (Tenn.), 471; *Lang v. Waters*, 47 Ala. 624.

So a husband may act as the agent of his wife. *Ready v. Bragg*, 1 Head (Tenn.), 511; *Knapp v. Smith*, 27 N.Y. (13 Smith) 277; *Buckley v. Wells*, 33 N. Y. (6 Tiff.) 518.

During the existence of a war between governments or States, no agent can be appointed by a citizen of one government or State to act in the territory of the other; and the appointment by a citizen of Georgia, during the rebellion, of an agent in New York, was held unlawful and void. *United States v. Grossmayer*, 9 Wall. 72. See *Hubbard v. Matthews*, 54 N. Y. (9 Sick.) 43; S. C., 13 Am. Rep. 562. An agent who was appointed before the war is not within the rule, so as to prevent him from collecting money for his principal. *Ib.* *Robinson v. International Life Ass. Co.*, 42 N. Y. (3 Hand) 54; S. C., 1 Am. Rep. 490; *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614; S. C., 3 Am. Rep. 218; *Ward v. Smith*, 7 Wall. 447. Though it has been held that war revokes an agent's authority. *Howell v. Gordon*, 40 Ga. 302; *Conley v. Burson*, 1 Heisk. (Tenn.) 145.

Although a principal may, in general, delegate to another the power to do what he himself may do, there are exceptions to this general rule. The appointment of an agent to do an illegal act is entirely void. *State v. Matthis*, 1 Hill (S. C.), 37. So, although the act to be done may be legal, it may be of such a confidential nature that the power to exercise it cannot be delegated. *Ante*, 213, § 1. A member of a partnership cannot appoint an agent to do all the acts which such partner might do, unless with the consent of the other partners. An artist or a professional man cannot substitute an agent to act in his place, without the consent of the employer.

§ 4. **An agent cannot delegate his authority.** It is a maxim of law that a delegated authority cannot be re-delegated; or, in other words, one agent cannot lawfully nominate or appoint another to perform the subject-matter of his agency. *Broom's Leg. Max.* 839. In many cases an agent is selected on account of his skill, experience, or integrity, or for some personal quality, and where this is the case, there is a confidence or trust on the part of the employer, which cannot be betrayed or disappointed by the agent in the selection by him of some third party to supply his place. *Schmaling v. Thomlinson*, 6 Taunt. 147; *McCormick v. Bush*, 38 Tex. 314; *Lewis v. Ingersoll*, 3 Abb. Ct. App. 55; S.

C, 1 Keyes, 347; *Barret v. Rhem*, 6 Bush (Ky.), 466; *Lyon v. Burgoyne*, 13 B. Monr. 400; *Loomis v. Simpson*, 13 Iowa, 532; *Bissell v. Roden*, 34 Miss. 63.

There are exceptions to this general rule, and there may be cases where an authority to substitute may be implied; as where it is indispensable by the laws, in order to accomplish the end; or it is the usual custom of trade; or it is understood by the parties to be the mode in which the particular business would or might be done; or where from the nature of the agency a sub-agent is necessary. *Laussatt v. Lippincott*, 6 Serg. & R. 386; *Johnson v. Cunningham*, 1 Ala. (N. S.) 249; *Dorchester Bank v. New England Bank*, 1 Cush. (Mass.) 177.

§ 5. **Of a general or a special agency.** Although a party who is capable of doing an act himself may do it by another as attorney or agent, yet there are cases in which the act must be done by an agent or attorney; as where the principal is a corporation, or mere artificial being, which cannot act except through an agent or attorney.

An agency may be general or special. The distinction between a general and a special agent is that the former, having a wide scope both of duty and authority, represents his principal in all matters within the ordinary limits of the principal's business, and this may be in one or more places; the latter is one whose authority is definitely limited, and whose duty is specified. *Cruzan v. Smith*, 41 Ind. 288. A person who is authorized by his principal to execute all deeds, sign all contracts, or purchase all goods required in a particular trade, business, or employment, is a general agent in that trade, business, or employment. But a person who is authorized by his principal to execute a particular deed, or to sign a particular contract, or to purchase a particular parcel of goods, is a special agent.

A person who is not a general agent in the proper sense of that term may still have a general authority in regard to a particular object or thing; as, to buy or sell a particular parcel of goods, or to negotiate a particular note or bill; since his agency is not limited in the purchase or sale of such goods, or the negotiating of such note or bill, or to any particular mode of doing it. *Whitehead v. Tuckett*, 15 East, 408; *Anderson v. Coonley*, 21 Wend. 279; *Nelson v. Hudson River R. R. Co.*, 48 N. Y. (3 Sick.) 498, 509; *Shelton v. Merchants' Dispatch Trans. Co.*, 59 N. Y. (14 Sick.) 258.

ARTICLE II

OF THE DIFFERENT KINDS OF AGENTS.

Section 1. In general. It is not practicable to specify all the kinds of business or transactions in which agents may be employed, or to enumerate the kinds or classes of agents in detail. And, since this work will contain titles which will explain the rights, duties and liabilities resulting from the existence of agencies, it will only be necessary in this place to name some of the more general classes of agents. Among these are attorneys at law, attorneys in fact, auctioneers, brokers, factors, consignees, supercargoes, ships' husbands, masters of ships, and partners.

In many cases there is but a single principal, and a single agent; but there may be two or more principals, as well as two or more agents. And in relation to principals, the general rule is, that if each has a several and a distinct interest, no one of them can ordinarily appoint an agent for all of the others, without the assent and concurrence of all of them. Thus, where two persons, by a joint instrument, consign two parcels of goods to a consignee for sale, where one of the parties owns one parcel of the goods, and the other party owns the other parcel; in such a case, no joint interest or joint agency would be created; but the consignee would become the several factor of each owner; and the owner of one parcel could not give instructions to the consignee which would be binding upon both, unless by the express or implied consent of the other. But, unless the consignee knows the facts, he will be at liberty to treat it as a joint consignment for the benefit of both, in which case the instructions of either, like the instructions of a partner, will be binding upon the other, and both will become jointly liable to him for his commissions and disbursements. So where different persons have separate and distinct, although undivided, interests in the same personal property, one of them cannot sell the interest of the other. *White v. Osborn*, 21 Wend. 72; *Dyckman v. Valiente*, 42 N. Y. (3 Hand) 549; *Tyler v. Taylor*, 8 Barb. 585; *Ward v. Gaunt*, 6 Duer, 257.

And what he could not lawfully do himself, he could not authorize an agent to do.

A different rule prevails in the cases of partnerships, for there each partner acts for himself, as well as agent for the others. See Partnership.

Sometimes two or more agents are appointed ; and the general common-law rule is, that when an authority is conferred, by the principal, upon two or more persons to do a mere private act, such act will not bind the principal unless all the persons join in doing it. *Sinclair v. Jackson*, 8 Cow. 543 ; *Heard v. March*, 12 Cush. (Mass.) 580 ; *Low v. Perkins*, 10 Vt. 532 ; *Rollins v. Phelps*, 5 Minn. 463 ; *Union Bank v. Beirne*, 1 Gratt. 226. But the authority may be given in such terms as to authorize a several execution ; or an execution by a majority or other number less than the whole. *Hawley v. Keeler*, 53 N. Y. (8 Sick.) 114 ; 62 Barb. 231 ; *Cedar Rapids, etc., R. R. Co. v. Stewart*, 25 Iowa, 115 ; *French v. Price*, 24 Pick. 13 ; *Guthrie v. Armstrong*, 5 B. & Ald. 628.

Where two persons are appointed agents jointly to take charge of the business of their principal for a specified term, if one of them becomes incapacitated, the business cannot be performed by the other alone, without the consent of the principal, who has a right to discontinue the agency. *Salisbury v. Brisbane*, 61 N. Y. (16 Sick.) 617.

ARTICLE III.

OF THE APPOINTMENT OF AGENTS.

Section 1. How appointed. An agent may be appointed by a written sealed instrument, an unsealed written instrument, or by a verbal authority without writing. This authority may be conferred before any act is done by the agent, or it may be established by a ratification of acts previously done by one who assumed to be an agent, although he had no authority as agent at the time the act was done. It will be sufficient that there is satisfactory evidence of the fact that the principal employed the agent, and that the agent undertook the trust.

§ 2. **By deed or sealed instrument.** There are a few exceptions to the general rule just mentioned. One of them is, that whenever any act of agency is required to be done in the name of the principal, under seal, the authority to the agent or attorney to do the act must generally be conferred by an instrument under seal.

Worrall v. Munn, 5 N. Y. (1 Seld.) 229 ; *Cooper v. Rankin*, 5 Binn. 613 ; *McNaughton v. Partridge*, 11 Ohio, 223 ; *Cummins v. Cassilly*, 5 B. Monr. (Ky.) 75 ; *Hibblewhite v. McMorine*, 6 Mees. & Wels. 200 ; *Preston v. Hull*, 22 Gratt. (Va.) 600 ; *Rowe v. Ware*, 30 Ga. 278 ; *Scheutze v. Bailey*, 40 Mo. 69.

§ 3. **By parol, or by an unsealed writing.** But the law does not require that an authority to an agent to sign an unsealed paper, or a written contract, shall also be conferred or evidenced by a writing. *Riley v. Minor*, 29 Mo. 439; *Lawrence v. Taylor*, 5 Hill, 107; *McWhorter v. McMahan*, 10 Paige, 386; *Worrall v. Munn*, 5 N. Y. (1 Seld.) 229; *Newton v. Bronson*, 13 N. Y. (3 Kern.) 587; *Baum v. Dubois*, 43 Penn. St. 260. If it is proved that the appointment of an agent was in writing, and there is a dispute as to the extent of the power conferred, the paper itself must be produced or accounted for. *Neal v. Patten*, 40 Ga. 363; *Rawson v. Curtiss*, 19 Ill. 456.

§ 4. **By corporations.** By the old common law an agent of a corporation must be appointed under the corporate seal. At the present day, no such rule prevails, and an agent may be duly and legally appointed by the trustees, directors, or other officers of the corporation, by a written vote properly taken. *Smith v. Birmingham Gas Co.*, 1 Ad. & E. 526; *Osborn v. Bank of United States*, 9 Wheat. 738; *Bates v. Bank of Alabama*, 2 Ala. (N. S.) 245.

So the authority of an agent may be implied or inferred by the subsequent acts of the corporation recognizing and adopting the acts of one who has assumed to act as its agent. *Franklin v. Globe Mutual Life Ins. Co.*, 52 Mo. 461; *Warren v. Ocean Ins. Co.*, 16 Me. 409; *Bank of United States v. Dandridge*, 12 Wheat. 64; *Olcott v. Tioga R. R. Co.*, 27 N. Y. (13 Smith) 546; *Dent v. North American Steamship Co.*, 49 N. Y. (4 Sick.) 390; *Ketchum v. Verdell*, 42 Ga. 534.

§ 5. **Express or implied authority.** An agency may be implied or inferred from the relation of the parties, and the nature of the employment, without proof of any express appointment. It may be presumed from repeated acts of the agent, if they are adopted and confirmed by the principal previously to the making of the contract, or the doing of the act, in relation to which the question is raised. *Commercial Bank of Buffalo v. Warren*, 15 N. Y. (1 Smith) 573; *Sweetser v. French*, 2 Cush. (Mass.) 309; *Jones v. Booth*, 10 Vt. 107; *Bank of Kentucky v. Brooking*, 2 Litt. (Ky.) 41; *Gulick v. Grover*, 33 N. J. L. (4 Vr.) 463; *Kountz v. Price*, 40 Miss. 341.

A subsequent ratification of the unauthorized acts of an agent must, to be valid, be with a full knowledge by the principal of all the material facts in the case. *Seymour v. Wyckoff*, 10 N. Y. (6 Seld.) 213; *Baldwin v. Burrows*, 47 N. Y. (2 Sick.) 199,

212 ; *Lester v. Kinne*, 37 Conn. 9 ; *Wright v. Burbank*, 64 Penn. St. 247.

So the subsequent ratification by a principal of the unauthorized acts of one who assumed to be his agent, must, to be valid, be with a full knowledge of the facts which affect his rights. *Nixon v. Palmer*, 8 N. Y. (4 Seld.) 398 ; *Williams v. Storm*, 6 Coldw. (Tenn.) 203.

Where the facts are undisputed, and the only question is whether the agent has the requisite authority to bind his principal, such question is one of law for the court, whether the authority is sought to be sustained by a previous authority, or by a subsequent ratification. *Gulick v. Grover*, 33 N. J. L. (4 V r.) 463.

ARTICLE IV.

OF THE NATURE AND EXTENT OF AN AGENT'S AUTHORITY.

Section 1. In general. Whatever an agent does, within the scope of his authority, is, in legal effect, the act of his principal, who is entitled to its advantages, and is also subject to its liabilities. And it is for this reason that principals may employ as agents, in the performance of their business, persons who have no legal capacity to make general valid contracts upon their own account. Infants are not personally bound by their contracts, unless they relate to the purchase of necessities, or the like ; and yet they may act as agents for others, and make contracts which are as binding upon the principal as though the agent were of full age. It is, therefore, the duty of the principal to protect his own rights, when he selects an agent to transact his business ; and if he neglects to do so, he will be compelled to bear the loss which may result from his own indifference or negligence. And since, on the other hand, the principal is entitled to the benefits resulting from the agent's acts, it is for his interest to select none but those possessing intelligence, business capacity and tact, as well as experience, and above all, possessed of the strictest integrity. In the selection of an agent, the principal ought always to bear in mind that he may suffer great loss from the acts of an incompetent, inexperienced, or dishonest person ; and that he may also lose all the profits or advantages that would naturally result from the selection of a proper person. If a principal employs an agent whom he knows to be incompetent to conduct his business properly, and a loss ensues in consequence, the result

is owing to his own folly, and he must bear the loss. *Wakeman v. Hazleton*, 3 Barb. Ch. 148.

§ 2. An agent's authority includes the usual and necessary means of executing it. It is not possible to foresee and to give directions as to all events or things that may occur in the course of executing the authority conferred upon an agent. In many cases there must be a large exercise of discretionary power by an agent. And, in determining what authority has been given, it may, as a general rule, be assumed that the principal intended to give, and that the authority conferred, includes, and carries with it, the power to employ all the usual and necessary means of executing it in such manner as to accomplish the objects which the principal had in view in creating the agency.

The illustrations of this rule are numerous and varied. The cashier of a bank, as its executive officer having charge of all its moneyed transactions in paying and receiving debts, and discharging and transferring securities, has authority to take such measures for the security, and eventual collection of a debt due to the bank, as he deems proper, and to act in reference to the collection and compromise of the debt, according to the general usage, practice and course of business. *Bridenbecker v. Lowell*, 32 Barb. 9, 17; *Minor v. Mechanis' Bank of Alexandria*, 1 Peters, 46.

An agent who is employed to collect a debt or claim may resort to such usual, proper and effective modes as the law furnishes. *Merrick v. Wagner*, 44 Ill. 266. He may commence an action and prosecute it to judgment and execution. *McMinn v. Richtmyer*, 3 Hill, 236; *Bush v. Miller*, 13 Barb. 481, 488; *Scott v. Elmendorf*, 12 Johns. 317; *Hirshfield v. Landman*, 3 E. D. Smith, 208.

And, where the law permits it, he may have the defendant arrested. *Howard v. Baillie*, 2 H. Bla. 618, 620; *Randall v. Harvey*, Palm. 394; or have his property attached. *Trenton Banking Co. v. Haverstick*, 6 Halst. (N. J.) 171; *Fairbanks v. Stanley*, 18 Me. 296.

So, an attorney who prosecutes an action, and obtains a judgment, may, without any other authority than his retainer in the suit, demand from the debtor an assignment of his choses in action, and on his refusal to comply, institute proceedings under the non-imprisonment act. *Steward v. Biddlecum*, 2 N. Y. (2 Comst.) 103. See *Gorham v. Gale*, 7 Cow. 739; *Levi v. Abbott*, 4 Exch. 588; *Erwin v. Blake*, 8 Peters, 18. A general agent of a

town has sufficient authority to employ counsel to defend an action brought against the town. *Knowlton v. Inhabitants, etc.*, 14 Me. 20.

An agent who is authorized to make contracts for the purchase of grain has power to modify or cancel such contracts as he may have made. *Anderson v. Coonley*, 21 Wend. 279. And if the agent rescinds a sale made by him, his principal becomes liable to refund any money paid upon such contract. *Bloomer v. Denman*, 12 Ill. 240. An authority to purchase grain necessarily includes an authority to give directions as to its delivery. *Owen v. Brockschmidt*, 54 Mo. 285. So an authority to deliver goods to a common carrier for transportation includes all necessary and usual means of carrying it into effect, and, among other things, the power to stipulate for the terms of transportation. *Nelson v. Hudson River R. R. Co.*, 48 N. Y. (3 Sick.) 498; *Shelton v. Merchants' Dispatch Trans. Co.*, 59 N. Y. (14 Sick.) 258; S. C., 48 How. 257. An authority to make a sale of lands and receive the purchase-money will empower the agent to execute the proper instrument required by law to carry the sale into effect. *Valentine v. Piper*, 22 Pick. 85, 92. So an authority to sell and convey lands for cash confers on the attorney or agent the right to receive the purchase-money. *Johnson v. McGruder*, 15 Mo. 365; *Hackney v. Jones*, 3 Humph. (Tenn.) 612.

A power to an agent to sell lands, on such terms in all respects as he might deem most advantageous, and to execute deeds of conveyance necessary for the full and perfect transfer of the title, authorizes the agent to insert in the deed the usual covenants of warranty. *LeRoy v. Beard*, 8 How. (U. S.) 451. And see *Very v. Levy*, 13 id. 345.

So an agent, whether general or special, who is authorized to sell personal property is presumed to possess the power of warranting its quality and condition, unless the contrary appear. *Nelson v. Coving*, 6 Hill, 336; *Tice v. Gallop*, 5 N. Y. S. C. (T. & C.) 51; S. C., 2 Hun, 446; *Franklin v. Ezell*, 1 Sneed (Tenn.), 497; *Skinner v. Gunn*, 9 Port. (Ala.) 305; *Palmer v. Hatch*, 46 Mo. 585. See *Bryant v. Moore*, 26 Me. 84. So an agent, employed to sell negotiable paper, may, in the absence of any limitation of his authority, represent it as a business note and valid. *Ferguson v. Hamilton*, 35 Barb. 427, 442; *Fenn v. Harrison*, 4 T. R. 177. But see *Lipscomb v. Kitrell*, 11 Humph. 256.

An agent who is employed to purchase goods by a principal who does not furnish the money to pay the purchase price, is au-

thorized to buy on credit. *Sprague v. Gillett*, 9 Metc. (Mass.) 91; *Perrotin v. Cuculla*, 6 La. 587. See *Fatman v. Leet*, 41 Ind. 133. An authority to a broker to buy a cargo of produce, and to load it upon a vessel, does not, by implication, and in the absence of any sufficient custom, give him power to borrow the money for such purchase, upon the credit of the principal, and to give bills or notes for the amount. *Bank of India v. Bugbee*, 1 Abb. Ct. App. 86; 3 Keyes, 641; 3 Trans. App. 243. See *Tabor v. Cannon*, 8 Metc. 456; *Paige v. Stone*, 10 id. 160. An agent who has a discretionary power to sell goods and collect the price, has an implied authority to make any deduction from the original price that could have been made by the principal. *Taylor v. Nussbaum*, 2 Duer, 302. An agent, who is employed to sell goods, may sell them upon credit, if that mode is according to the usages of trade, and he is not restrained by his instructions, if he does not unreasonably extend the term of credit, and if he uses due diligence for the purpose of learning whether the purchaser is solvent. *Van Alen v. Vanderpool*, 6 Johns. 69; *Clark v. Van Northwick*, 1 Pick. 343; *Greely v. Bartlett*, 1 Greenl. 172; *Laussatt v. Lippincott*, 6 Serg. & R. 386; *Forrestier v. Boardman*, 1 Story, 43; *Porter v. Payne*, 9 Iowa, 549.

An authority to sell "upon credit," means a reasonable credit, and the question of reasonableness is one of fact. *Brown v. Central Land Co.*, 42 Cal. 257.

Acting as clerk for a merchant does not authorize the clerk to sign the name of the principal to notes in his absence. *Terry v. Fargo*, 10 Johns. 114; *Smith v. Gibson*, 6 Blackf. 369. But, where it appears that a clerk of a mercantile house has before signed notes or bills with the assent, or to the knowledge of the principals, without dissent, a jury may find that there was authority to sign a note of a similar kind at a subsequent time. *Dows v. Green*, 16 Barb. 72. See *Stevenson v. Hoy*, 43 Penn. St. 191. A special authority from the owner to look up property mislaid or lost by a common carrier does not imply any authority to settle for the damages resulting from the carrier's neglect. *Congar v. Galena & Chicago Union R. R. Co.*, 17 Wis. 477, 484. An agent who acts under a general power of attorney, which gives him power to draw or indorse checks for and in the name of his principal, has no authority to overdraw his principal's account at the bank. *Union Bank, etc. v. Mott*, 39 Barb. 180. Where there are two agents, who receive their instructions directly from the principal, and each agent is independent of the

other, neither of them has a right to repudiate the acts of the other, unless by special authority of the principal. *Law v. Cross*, 1 Black. (U. S.) 533. An authority to an agent to collect or secure a debt does not authorize him to take property in payment of the debt. *Taylor v. Robinson*, 14 Cal. 396; *Earnhart v. Robertson*, 10 Ind. 8. So an agent employed to collect a bond is not authorized to take notes instead of money; and the party paying in notes must see that the agent is authorized to accept them in payment. *Mathews v. Hamilton*, 23 Ill. 470; *Corning v. Strong*, 1 Cart. (Ind.) 327.

Yet, where a foreign creditor of a debtor who was on the eve of bankruptcy gives his agent written authority to "see" the debtor "in regard to" the debt, with "full authority to act for" such creditor "in the matter," this will authorize the agent to receive personal property from the debtor in satisfaction of the debt. *Oliver v. Sterling*, 20 Ohio St. 391. Giving power to receive checks instead of cash, in payment of bills held for collection, does not confer authority to indorse and collect the checks. *Graham v. United States Saving Institution*, 46 Mo. 186. An authority to receive the amount of account, or to receive a note for it, does not empower the agent to dispose of the note. *Hays v. Lynn*, 7 Watts, 524. So, an agent who is employed to sell property upon credit has no implied authority to foreclose a mortgage which he had taken to secure the amount at a future day; nor has he authority, on the foreclosure sale, to buy in the property for his principal. *Aultman v. Jones*, 1 Woolw. 99. So, an agent employed to collect or receive payment of a demand is not authorized, on a part payment of the sum due, to extend the time of payment of the balance. *Hutchings v. Munger*, 41 N. Y. (2 Hand) 155. Where one person assumes to act for another as agent, it is immaterial to the question of agency, so far as third persons are concerned, whether he acts by the direction and request, or merely by the permission of the principal, for he is equally his agent in either case. *Fay v. Richmond*, 43 Vt. 25.

§ 3. **Authority, when limited.** It is a maxim of the law, that general words may be aptly restrained according to the subject-matter or persons to which they relate. *Broom's Leg. Max.* 646. See *ante*, 125, ch. 2, § 15.

In regard to the extent or powers of an agency, the law will not, from mere general expressions, infer the existence of unusual or extraordinary powers, but will restrain them to the clear

and obvious intent and object of the agency. However general the language may be, if it is used in connection with some particular subject-matter, the presumption will be that the language related to that matter, and it will be construed and limited accordingly. When a power of attorney in respect to specified lands, authorizes the agent to sell or lease them, to take charge of them, to demand all moneys due, or to grow due, upon any contracts, leases or securities, to prosecute suits for his principals in respect to such lands, this will not authorize him to assign a cause of action for a trespass upon such lands. *Geiger v. Bolles*, 1 N. Y. S. C. (T. & C.) 129. So a power of attorney "to enforce, either privately or before court," a specified claim of a certain amount, and to do every thing "which may be requisite to collect such sum," does not confer authority upon the agent to assign the claim to a third person. *Garrigue v. Loescher*, 3 Bosw. 578, 584.

A power of attorney to sell "claims and effects" cannot be construed as an authority to sell lands. *Cordova v. Knowles*, 37 Tex. 19. An authority to sell, transfer, and convey lands, does not authorize the agent to exchange them for other property. *Reese v. Medlock*, 27 Tex. 120. So a power of attorney simply authorizing the agent to conduct or control the principal's business affairs during his absence, does not authorize the agent to sell the principal's land. *Watson v. Hopkins*, 27 Tex. 637. An agent of a corporation who has general powers to settle claims against his principal is not impliedly authorized to submit them to arbitration. *Michigan, etc., R. R. Co. v. Gongar*, 55 Ill. 503. A verbal authority "to sell," or "to close a bargain" in regard to real estate, is no more than a mere authority to find a purchaser at the price specified; it confers no power upon the agent to sign the name of his principal to a contract of sale. *Duffy v. Hobson*, 40 Cal. 240; 6 Am. Rep. 617. A general authority to transact business, and to receive and discharge debts, does not confer upon the agent a power to accept or indorse bills so as to charge his principal. *Sewanee Mining Co. v. McCall*, 3 Head (Tenn.), 619. A telegram by the owner of a vessel which is ashore, in the following words: "Send me a small tow-boat. * * * Make the best bargain you can," contemplates the hiring of a boat already manned and equipped, and in the absence of proof of a necessity for such action, or evidence of a custom or usage to that effect, the agent will not be authorized to assume on behalf of the principal the perils of the service or the risks

of the voyage, or to insure against the negligence of any one employed in navigating or handling the boat. *Martin v. Farnsworth*, 49 N. Y. (4 Sick.) 555.

A power of attorney to collect debts; to execute deeds of lands; to accomplish a complete adjustment of all the concerns of the principal in a specified place, and to do all other acts which the principal could do in person, does not authorize the agent to give a note in the name of his principal. *Rossiter v. Rossiter*, 8 Wend. 494; *Holtsinger v. National Corn Exchange Bank*, 37 How. 203; 6 Abb. (N. S.) 292; 1 Sweeny, 64.

A general agent is not authorized to employ attorneys and counsel on the credit of his principal, to commence and prosecute a suit in favor of a servant of the principal, for a personal injury done to such servant while in the service of the principal. *Cochran v. Newton*, 5 Denio, 482. So an agent of a stage company who is authorized to obtain surgical aid for a passenger who was injured by the upsetting of the coach, is not therefore authorized to employ a physician to attend one who has acted as coachman, without the consent or knowledge of the company, and who had also been injured by the same accident. *Shriver v. Stevens*, 12 Penn. St. 258. So the station-master or other agents of a railroad company cannot, without express authority, bind the company by contracts for surgical attendance upon passengers injured by an accident in the moving of the trains. *Cox v. Midland Counties Railway Co.*, 3 Exch. 268; 13 Jur. 65; 18 L. J. Exch. 65.

The superintendent of a railroad who has a general supervisory control over the whole line of the road, and of every thing connected with the running of the road, and of the payment to drivers, conductors, and other persons employed by him as superintendent, but having no direction over the treasury, is not authorized to bind the company by the employment of a physician to attend upon a child which had been run over by a car and severely injured. *Stephenson v. New York & Harlem R. R. Co.*, 2 Duer, 341.

But in England it has been held that the general manager of a railway company has, as incidental to his employment, authority to bind the company to pay for surgical attendance, bestowed at his request, on a servant of the company injured by an accident on their railway. *Walker v. Great Western Railway Co.*, L. R., 2 Exch. 228.

§ 4. Notice of extent of agent's authority. There are numer-

ous instances in which a party dealing with an agent is bound to ascertain the extent of the agent's authority, or to submit to any loss which may result from his want of care. A naked power to do acts for a principal, and in his name, negatives all authority on the part of the attorney to act for the benefit of any one but the principal, and persons dealing with the attorney, as such, are bound to notice this limitation. *Stainer v. Tysen*, 3 Hill. 279; *North River Bank v. Aymar*, id. 262; *Martin v. Farnsworth*, 49 N. Y. (4 Sick.) 555, 558; *Towle v. Leavitt*, 23 N. H. 360. Whenever a party has notice that an agent is acting under a written authority, or has such knowledge as ought to put him upon inquiry as to the extent of the agent's powers, or where the agent signs his name as such, it is the duty of the party dealing with him to ascertain whether he has authority to act for the principal in the manner he assumes to do. *Ib.*; *Dozier v. Freeman*, 47 Miss. 647. One who deals with an agent, acting under an express, or a general authority, whether written or verbal, is bound to know, at its peril, the power of such agent, and its legal effect. *Payne v. Potter*, 9 Iowa, 549; *Beach v. Vandewater*, 1 Sandf. 265; *Hunt v. Chapin*, 6 Lans. 139; *Baxter v. Lamont*, 60 Ill. 237; *Morris v. Watson*, 15 Minn. 212. Purchasers of negotiable paper, issued by an agent, the nature and extent of whose authority must, by law, appear upon the face of public records, are chargeable with notice of whatever appears upon those records. *Lewis v. Commissioners of Bourbon County*, 12 Kans. 186. So, where negotiable paper is issued by a government officer, whose powers and duties are limited and defined by laws, it is the duty of one who takes such paper to ascertain that the officer had authority to make or issue it. *The Floyd Acceptances*, 7 Wall. (U. S.) 666, 676, 677, 680.

§ 5. **Private instructions to agent.** Instructions from a principal to his agent, which operate as private restrictions upon a general agency, do not affect persons dealing with the agent in ignorance of them. *Johnson v. Jones*, 4 Barb. 369; *Bryant v. Moore*, 26 Me. 84; *Davenport v. Peoria Marine & Fire Ins. Co.*, 17 Iowa, 276; *Cross v. Haskins*, 13 Vt. 536; *Hatch v. Taylor*, 10 N. H. 538; *Cruzan v. Smith*, 41 Ind. 288; *Cosgrove v. Ogden*, 49 N. Y. (4 Sick.) 255; S. C., 10 Am. Rep. 361; *Bradford v. Bush*, 10 Ala. 386; *Ezell v. Franklin*, 2 Sneed, 236; *Hunter v. Jameson*, 6 Ired. 252.

Where a written authority is known to exist, or by the nature of the transaction is presupposed, it is the duty of persons who

deal with the agent to inquire as to the nature and extent of his authority ; but no such duty exists in relation to any private letter of instructions from the principal to the agent, since they may be presumed to be of a confidential nature, not intended to be disclosed to third persons. *Ib. Withington v. Herring*, 5 Bing. 442 ; *Munn v. Commission Co.*, 15 Johns. 44.

So, where a written authority apparently authorizes the act done by the agent, it is no answer to the principal's liability to show that the agent has exceeded his real authority. *Bridenbecker v. Lowell*, 32 Barb. 9.

Whether the authority conferred upon an agent be verbal or written, the principal will be bound by acts within the apparent authority ; and, if the authority is inferred from acts done by the agent, the principal will be bound by such acts as he permits to be done with his knowledge, and without objection on his part, so far as they affect the rights of innocent third persons. *St. Louis & Memphis Packet Co. v. Parker*, 59 Ill. 23 ; *Fatman v. Leet*, 41 Ind. 133 ; *Kerslake v. Schoonmaker*, 3 N. Y. S. C. (T. & C.) 524 ; 1 Hun, 436 ; *Tucker v. Woolsey*, 64 Barb. 142 ; 6 Lans. 482 ; *Philadelphia, etc., R. R. Co. v. Weaver*, 34 Md. 431 ; *Bronson v. Chappell*, 12 Wall. (U. S.) 681 ; *Golding v. Merchant*, 43 Ala. 705.

§ 6. **Ambiguous authority.** Every authority conferred upon an agent ought to be expressed in plain and explicit terms ; for, if the language is ambiguous or obscure, the principal will be bound by the rule that instruments are most strongly construed against the grantor or promisor, *ante*, 124, § 14. So it is a universal rule, based on principles of policy, propriety and justice, that if a principal puts his agent in a condition to impose on innocent third persons, by apparently pursuing his authority, he shall be bound by his acts. *Dunning v. Roberts*, 35 Barb. 463, 467 ; *Dodge v. McDonnell*, 14 Wis. 553 ; *Garrard v. Haddan*, 67 Penn. St. 82 ; S. C., 5 Am. Rep. 412 ; *Van Duzer v. Howe*, 21 N. Y. (7 Smith) 531 ; 31 Barb. 100.

§ 7. **Usage or custom.** In the construction of contracts, custom or usage sometimes has an important influence, *ante*, 127, § 20. The relation of principal and agent is a voluntary relation, springing from a contract, to which the consent of the parties is essential. *Raney v. Wood*, 3 Sandf. 577 ; 8 N. Y. Leg. Obs. 182. And when a question arises as to the authority or power of an agent in some particular transaction, the effect which usage has in such case may be of the highest importance in determining

the rights of the parties. When evidence of usage is admitted, it is not received for the purpose of enlarging the power or authority of the agent, but for the purpose of interpreting the power or authority which has actually been given. And when an authority is conferred upon an agent, it carries with it the right to act according to the usual customs of the trade or business to which it relates, *ante*, 221, § 2, and cases there cited; see, also, *ante*, 127; Custom. One who employs a broker to transact business for him, will be bound by the customs of brokers, whether he knew of them or not. *Whitehouse v. Moore*, 13 Abb. 142; *Pollock v. Stables*, 12 Q. B. 765; *Bayliffe v. Butterworth*, 1 Exch. 425; *Sutton v. Tatham*, 10 Ad. & El. 27; *Northern, etc., Railway Co. v. Bastian*, 15 Md. 494; see 1 Broom & Had. 48, 49, 50, etc., notes to Wait's ed.

The custom, however, must be general, or it will not be binding. And where a usage is adopted by a certain class of factors, as to the disposition of the funds of their principals, this will not relieve such a factor from a duty or a liability which the law would otherwise impose upon him, unless he shows that his principal had knowledge of such usage, or that he assented to that mode of doing business. *Farmers & Mechanics' Nat. Bank, etc. v. Sprague*, 52 N. Y. (7 Sick.) 605; *Duguid v. Edwards*, 50 Barb. 288, 295; *Boardman v. Gaillard*, 1 Hun, 217; S. C., N. Y. S. C. (T. & C.) 695; 60 N. Y. (15 Sick.) 614.

§ 8. **Parol evidence to enlarge authority.** It is a general rule that an express power, conferred by writing, cannot be enlarged by parol evidence. But this rule is applicable to those cases only in which the whole authority arises exclusively from the writing; and where the parol evidence applies to the same subject-matter at the same time, and, in effect, seeks to contradict, vary, or control the written instrument. And where it is sought by parol evidence to establish a subsequent enlargement of the original authority, or to give an authority for another object, or where the express power is engrafted on an existing agency, affecting it only to a limited extent, the rule does not apply. *Williams v. Cochran*, 7 Rich. Law (S. C.), 45; *Hartford Ins. Co. v. Wilcox*, 57 Ill. 182. If an agent has been authorized in writing to buy specified goods at a fixed price, parol evidence may be given to show a subsequent parol authority to purchase other goods at a different price, or the same goods at a different price, for this would not contradict, vary, or control the legal construction or effect of the original authority. Story on Agency, § 80.

If the authority be in writing, and this is known by the party dealing with the agent, the authority must be strictly pursued, and it cannot be enlarged by evidence of usage. *Delafeld v. State of Illinois*, 26 Wend. 192, 222; S. C., 2 Hill, 159; 8 Paige, 527; *Hogg v. Snaith*, 1 Taunt. 347.

Where an express authority is conferred by informal instruments, such as letters of advice, or instructions, or loosely drawn orders, which are general in their terms, or confer a general authority, they are construed with more liberality than more formal and deliberate instruments. Whart. on Agency, § 226; Story on Agency, § 84.

§ 9. **Acts to be done in a foreign country or State.** An authority to an agent to transact business for his principal, in a foreign country, or in another State, will, in the absence of evidence to the contrary, be presumed to include an authority to transact it in the forms, by the instruments, and according to the laws of the place where the business is to be done. *Owings v. Hull*, 9 Peters, 607, 627. And, under such circumstances, each party is bound to know what such forms and instruments are, and what acts are required by those laws. *Ib.* It would be unreasonable to presume that the principal authorized the end, and refused the lawful means; or that he intended to violate the laws, or to mislead his agent, in relation to his powers. *Ib.* See, also, *Treat v. Celis*, 41 Cal. 202; *Neille v. United States*, 7 Ct. of Claims, 535.

§ 10. **Extent of authority; how far implied.** When an agency arises by implication and presumption from the facts and circumstances of the case, the nature and extent of the authority conferred upon the agent will be ascertained and limited in the same manner, and be governed by the same considerations which control in the construction of an express authority which is conferred in general terms. If the agency arises by implication from several previous acts done by the agent, with the tacit consent or acquiescence of the principal, such agency will be limited to acts of a like nature. *Cox v. Hoffman*, 4 Dev. & Bat. (N. C.) 180; *Chidsey v. Porter*, 21 Penn. St. 390; *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. Ct. App. 315; 3 Keyes, 280; 1 Trans. App. 394; 5 Abb. (N. S.) 80; 37 How. 365; *Gilbraith v. Linenberger*, 69 N. C. 145; *Philadelpdia, etc., R. R. Co. v. Weaver*, 34 Md. 431; *Commercial Bank of Lake Erie v. Norton*, 1 Hill, 501.

If it arises from the employment of the agent in a particular

business, it will, in like manner, be limited to that particular business. *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Kerm v. Piper*, 4 Watts, 222; *Terry v. Fargo*, 10 Johns. 114; *Cooley v. Willard*, 34 Ill. 69.

The authority must be implied from facts which have occurred in the course of such employment, and not from mere argument as to the utility and propriety of its possession by the agent. *Hawtayne v. Bourne*, 7 Mees. & Wels. 595; *Burmester v. Norris*, 6 Exch. 796.

If the agency arises from an authority to do a single or particular act, it is limited to the appropriate means of accomplishing that very act, and the required end, and it extends no further. *Howell v. Gordon*, 40 Ga. 302; *Morris v. Watson*, 15 Minn. 212.

In brief, an implied agency is never construed to extend beyond the obvious purposes for which it is apparently created. *Aultman v. Jones*, 1 Woolw. 99; *Graham v. United States Savings Institution*, 46 Mo. 186.

The silence of a party may sometimes be construed as an authority to do an act. If the owner of goods stands by and voluntarily, and without objection on his part, permits another to sell them as his own to a purchaser in good faith, the sale will conclude the owner. *Thompson v. Blanchard*, 4 N. Y. (4 Comst.) 303. See, also, *Edgerton v. Thomas*, 9 N. Y. (5 Seld.) 40; *Roraback v. Stebbins*, 4 Abb. Ct. App. 109; 3 Keyes, 62; 33 How. 278; *Pickard v. Sears*, 6 Ad. & El. 469, 474.

§ 11. **Of notice to agents.** It is the duty of every agent to notify his principal of all facts which come to his knowledge, if they will or may materially affect the rights or interests of such principal. The law presumes that an agent will perform this duty, and therefore the rule is conclusively settled that the principal knows whatever the agent knows in relation to the business of the agency. *Sutton v. Dillaye*, 3 Barb. 529; *Meekhan v. Forrester*, 52 N. Y. (7 Sick.) 277; *Ingalls v. Morgan*, 10 N. Y. (6 Seld.) 178, 184; *Hovey v. Blanchard*, 13 N. H. 145; *Smith v. Water Com.*, 38 Conn. 208; *Philadelphia v. Lockhart*, 73 Penn. St. 217; *Slater v. Irwin*, 38 Iowa, 261.

An omission by an agent to notify his principal of facts coming to his knowledge in relation to the business of the agency, will not affect the liability of the principal, and the agent's knowledge will be equally as binding upon the principal as though he had notice, and the rule is the same whether the omis-

sion of the agent was accidental or intentional. *Dillon v. Anderson*, 43 N. Y. (4 Hand) 232; *Bank of United States v. Davis*, 2 Hill, 451, 461; *Hovey v. Blanchard*, 13 N. H. 145; *Ross v. Houston*, 25 Miss. 591.

In several of the cases it is laid down that the notice, to be binding upon the principal, must have been received or obtained by the agent in the course of the business of the particular agency. *Westfield Bank v. Cornen*, 37 N. Y. (10 Tiff.) 320; S. C., 4 Trans. App. 442; *Farmers and Citizens' Bank v. Payne*, 25 Conn. 444, 449, 450; *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *McCormick v. Wheeler*, 36 Ill. 114, 121; *Congar v. Chicago & Northwestern R. R. Co.*, 24 Wis. 157; S. C., 1 Am. Rep. 164; *Willis v. Vallette*, 4 Metc. (Ky.) 186.

But there are cases which hold that notice to an agent is notice to his principal, whether acquired by the agent in the particular transaction, or acquired by him in a prior transaction, and present in his mind at the time he is acting as agent, if the knowledge is of such a character that he may communicate it to his principal without a breach of professional confidence. *The Distilled Spirits*, 11 Wall. (U. S.) 356, 366; *Hart v. Farmers and Mechanics' Bank*, 33 Vt. 252; *Patten v. Merchants and Farmers' Mutual Fire Ins. Co.*, 40 N. H. 375; *Dresser v. Norwood*, 17 C. B. (N. S.) 466, 482-482 *d.*, note.

Where there are several joint agents, notice to one of them is equally notice to the principal. *Bank of United States v. Davis*, 2 Hill, 451, 464.

§ 12. Powers on extraordinary occasions. Although, as a general rule, an agent is required to conform to his instructions, or authority, yet there may be instances in which a strict and literal adherence to their terms would defeat the object of the agency. There may arise such new and unexpected emergencies and necessities as will justify the agent in assuming extraordinary powers, which, if done in good faith, and with sound discretion, will bind the principal. *Lawlor v. Keaquick*, 1 Johns. Cas. 175, 179, *n.*; *Judson v. Sturges*, 5 Day, 556, 560; *Forrester v. Boardman*, 1 Story, 43; *Liotard v. Graves*, 3 Caines, 226; *Williams v. Shackelford*, 16 Ala. 318; *Gould v. Rich*, 7 Metc. (Mass.) 556; *Greenleaf v. Moody*, 13 Allen, 362.

§ 13. Ratification of assumed authority. Where a principal, with a full knowledge of all the facts and circumstances of the case, deliberately ratifies or acquiesces in the acts or omissions of his agent, he will be bound as fully as though he had given

a previous authority in relation to the acts or omissions. *Kelsey v. National Bank of Crawford*, 69 Penn. St. 426; *Gulick v. Grover*, 33 N. J. L. (4 Vr.) 463; *Drakely v. Gregg*, 8 Wall. 242; *Vincent v. Rather*, 31 Tex. 77; *Hawley v. Keeler*, 53 N. Y. (8 Sick.) 114.

But to render a ratification binding upon a principal, it must be made or founded upon a full knowledge of all the material facts and circumstances affecting his interests. *Pittsburgh, etc., R. R. v. Gazzam*, 32 Penn. St. 340; *Combs v. Scott*, 12 Allen, 493; *Manning v. Gasharie*, 27 Ind. 399; *Humphreys v. Havens*, 12 Minn. 298.

The ratification must be entire, or not at all; the principal is not permitted to ratify in part, and to reject in part. *Southern Exp. Co. v. Palmer*, 48 Ga. 85; *Cochran v. Chitwood*, 59 Ill. 53; *Widner v. Lane*, 14 Mich. 124; *Krider v. Western College*, 31 Iowa, 547; *Billings v. Morrow*, 7 Cal. 171; *Hardeman v. Ford*, 12 Ga. 205; *Menkens v. Watson*, 27 Mo. 163; *Henderson v. Cummings*, 44 Ill. 325; *Coleman v. Stark*, 1 Oregon, 115. A ratification of a part of an unauthorized transaction of an agent, or of one who assumes to act as such, is a confirmation of the whole. *Farmers' Loan and Trust Co. v. Walworth*, 1 N. Y. (1 Comst.) 433; *Fowler v. Trull*, 1 Hun, 409; S. C., 3 N. Y. S. C. (T. & C.) 522; *Krider v. Western College*, 31 Iowa, 547; *Menkens v. Watson*, 27 Mo. 163.

A ratification by a person of an act done in his behalf, by another without authority, if made under a misapprehension or in ignorance of the full scope of the act, is voidable to the extent of the mistake. *Miller v. Board of Education of Sacramento*, 44 Cal. 166; *Smith v. Tracy*, 36 N. Y. (9 Tiff.) 79; 3 Trans. App. 345; *Lester v. Kinne*, 37 Conn. 9.

A person cannot ratify acts done without his authority, unless they were done for him by one who assumed to be his agent. *Condit v. Baldwin*, 21 N. Y. (7 Smith) 219, 225; *Watson v. Swann*, 11 C. B. (N. S.) 755; *Wilson v. Tummam*, 6 Man. & Grang 236; *Farmers' Loan and Trust Co. v. Walworth*, 1 N. Y. (1 Comst.) 433, 444; *Commercial Bank v. Jones*, 18 Tex. 811. This principle might, perhaps, exclude the ratification of a forged signature to a note. *Brook v. Hook*, L. R., 6 Exch. 89. But in this country a party may ratify a forged signature of his name. *Forsyth v. Day*, 46 Me. 176; *Union Bank v. Middlebrook*, 33 Conn. 95; *Greenfield Bank v. Crafts*, 4 Allen, 447; *Howard v. Duncan*, 3 Lans. 174; *Livings v. Wiler*, 32 Ill. 387; *Fitzpatrick v. School Commissioners*, 7 Humph. 224.

The act of an agent may be presumed to have been ratified by his principal when the acts and conduct of the latter are inconsistent with any other supposition, as where he receives and holds the fruits of the agent's act. *Maddux v. Bevan*, 39 Md. 485; *Ketchum v. Verdell*, 42 Ga. 534; *Williams v. Storm*, 6 Coldw. 203; *Ballston Spa. Bank v. Marine Bank*, 16 Wis. 120; *Woodbury v. Laund*, 5 Minn. 339; *Ecum v. Brister*, 35 Miss. 391; *Hall v. Harper*, 17 Ill. 82.

A ratification once deliberately made, upon full knowledge of all the material facts, becomes at once obligatory, and cannot afterward be revoked or recalled. *Clark's Exrs. v. Van Reimsdyck*, 9 Cranch, 153; *Breck v. Jones*, 16 Texas, 461; *Hazelton v. Batchelder*, 44 N. H. 40; *Bell v. Byerson*, 11 Iowa, 233.

A principal, who is informed of an unauthorized act done by his agent, must give notice of his dissent within a reasonable time, or his assent and ratification will be presumed. *Cairnes v. Bleecker*, 12 Johns. 300; *Jervis v. Hoyt*, 2 Hun, 637; S. C., 5 N. Y. S. C. (T. & C.) 199; *Johnson v. Wingate*, 29 Me. 404; *Clay v. Spratt*, 7 Bush (Ky.), 334; *Farwell v. Howard*, 26 Iowa, 381; *Law v. Cross*, 1 Black. (U. S.) 533; *Williams v. Merritt*, 23 Ill. 623.

A subsequent ratification relates back to the time of the original transaction. *Lowry v. Harris*, 12 Minn. 255; *Lawrence v. Taylor*, 5 Hill, 107; *Hawkins v. Baker*, 46 N. Y. (1 Sick.) 666, 670; *Forsyth v. Day*, 46 Me. 176.

Where the act of the agent is done in the name of the principal by an instrument which is required by law to be under seal, there the ratification, to be valid, must also be under seal. *Blood v. Goodrich*, 12 Wend. 525; 9 Wend. 68; *Worrall v. Munn*, 5 N. Y. (1 Seld.) 229; *Boyd v. Dobson*, 5 Humph. 37.

If an agent unnecessarily affixes a seal to an instrument which is not required by law, it may operate as an unsealed instrument, and, of course, the ratification need not be sealed. *Worrall v. Munn*, 5 N. Y. (1 Seld.) 229; *Ledbetter v. Walker*, 31 Ala. 175; *Bates v. Best*, 13 B. Monr. 215; *Dispatch Line of Packets v. Bellamey Manuf. Co.*, 12 N. H. 205, 232; *Cooper v. Rankin*, 5 Binn. 613.

Before a ratification can be binding, the principal must have an opportunity for election and action. *Walters v. Munroe*, 17 Md. 150; *Robinson v. Chapline*, 9 Iowa, 91; *Dupont v. Wertherman*, 10 Cal. 354.

§ 14. Agent's declarations do not prove authority. An agency cannot be established by the declarations or the acts of one who

assumes to be an agent. *Streeter v. Poor*, 4 Kans. 412; *Perkins v. Stebbins*, 23 Barb. 523; *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. Ct. App. 315; 1 Trans. App. 334; 3 Keyes, 280; 5 Abb. (N. S.) 80; 37 How. 365; *McDougald v. Dawson*, 30 Ala. 553; *Scarborough v. Reynolds*, 12 id. 252.

ARTICLE V.

OF THE DUTIES OF AGENTS.

Section 1. In general. An agent ought, as far as possible, to represent his principal; and to the best of his ability he should endeavor to successfully accomplish the object of the agency. If he possesses skill and experience he is expected and required to use them in the discharge of his duties; and, for inexcusable negligence or want of skill, he will be personally liable to his principal, if he suffers loss in consequence. It is also his duty to be well informed in relation to the transactions which occur during the execution of the agency, and further to keep his principal fully and promptly informed of all material facts or circumstances which come to his knowledge. And, since he is expected to represent his principal, he cannot have a personal interest adverse to the interest of his principal; and if he deals with the subject-matter of the agency, the profits will, as a general rule, belong to the principal, and not to himself. He is limited to the discharge of his duties in person, unless his authority expressly or impliedly gives him power to employ an assistant or substitute, or unless, in extraordinary emergencies, it may be absolutely necessary. In all things he is required to exercise a sound discretion, and to act in entire good faith toward his principal. These general views will be further explained, and sufficient authorities cited during the course of this chapter.

§ 2. Agent must act in person. It is almost universally true that the employment and trust are personal to the agent, they usually rest upon some personal ground of confidence in the integrity, ability, skill or experience of the agent, to whose hands the principal may be willing to confide or intrust his business, while he might not have any such confidence in the person to whom the agent might intrust it, if he had the legal authority to do so. This rule, however, is not carried so far as to prevent an agent from employing such assistance as he may need in executing the duties of his trust. It is the integrity, the intelligence, skill, or

experience of the agent employed by the principal, which the law requires to be exercised by the agent himself. An agent cannot delegate any portion of his power requiring the exercise of discretion or judgment; but it is otherwise, however, as to powers or duties which are merely mechanical in their nature. And, therefore, if an agent is empowered to bind his principal, by an accommodation acceptance, he may direct another to write it, he himself having first determined the propriety of the act; and though the acceptance name the delegate, and not the agent as the person exercising the power, it will, nevertheless, bind the principal. *Commercial Bank of Lake Erie v. Norton*, 1 Hill, 501; *Weeks v. Fox*, 3 N. Y. S. C. (T. & C.) 354; *Williams v. Woods*, 16 Md. 220; *Ex parte Sutton*, 1 Cox, 84; but see *Blore v. Sutton*, 3 Meriv. 237; *Henderson v. Barnwall*, 1 Y. & Jerv. 387.

It is very clear, however, that a bare authority or power conferred by a principal upon an agent must be executed by the latter in person, and that he cannot delegate his authority to another. *Ib.* Unless from the express language used, or from the fair presumption growing out of the particular transaction, or of the usage of trade, a broader power is conferred, an agent's authority is exclusively personal, without the right of substitution. *Smith v. Sublett*, 28 Tex. 163; *Lynn v. Burgoyne*, 13 B. Monr. 400; *Lewis v. Ingersoll*, 3 Abb. Ct. App. 55; 1 Keyes, 347; *Bocock v. Pavey*, 8 Ohio St. 270.

§ 3. As to the mode of executing the authority. An agent ought, as a general rule, to transact the business of the agency in the name of his principal. *Dennison v. Story*, 1 Oregon, 272; *Spencer v. Field*, 10 Wend. 87.

It is, however, in relation to written instruments, that this rule is applied with greater strictness; and, it is a general rule, subject to exceptions and qualifications, that a written instrument must purport upon its face to be the act of the principal, by inserting his name in the body, and signing it at the end of the instrument, so as to show that the principal intends to be bound by it. The proper mode of executing an authority by an agent is to do it in the name of the principal or person giving the authority, and not in the name of the agent. Thus, where A is the principal, and B is the agent, the latter should execute the paper by signing it A, by B, his agent.

It is in reference to the execution of sealed instruments that the rule is most strictly enforced; and, a sealed instrument, when executed by one acting as an agent or attorney, must be

executed in the name of the principal, and purport to be sealed with his seal, or the person named as principal will not be bound by it. *Townsend v. Hubbard*, 4 Hill, 351; *Clarke v. Courtney*, 5 Peters, 319, 351; *Elwell v. Shaw*, 16 Mass. 42; § 1, Greenl. (Me.) 339; *Martin v. Flowers*, 8 Leigh (Va.), 158; *Skinner v. Gunn*, 9 Port. (Ala.) 305; *Brinley v. Mann*, 2 Cush. (Mass.) 337; *Fire Ins. Co. v. Doll*, 35 Md. 89; *Reed v. Latham*, 40 Conn. 452; *Grubbs v. Wiley*, 9 Sm. & Marsh. 29; *Einstein v. Holt*, 52 Mo. 340.

There is no technical mode of executing an instrument, even when under seal, which is so strictly applied as to prevent a clear and substantial compliance with its spirit from being sufficient. For, while the correct mode of signature would be "A B by his attorney, C D," it will be sufficient if signed "For A B" (the principal), "C D" (the agent). Under such circumstances, if the preceding contract or obligation be in the name of the principal, the order of the words is not material, since the deed purports on its face to be the deed of the principal; and the intention is to execute it in his name, and as his deed. *Wilks v. Back*, 2 East, 142; *Mussey v. Scott*, 7 Cush. (Mass.) 216; *Wilburn v. Larkin*, 3 Blackf. 55; *Martin v. Almond*, 25 Mo. 313; *Hunter v. Miller*, 6 B. Monr. 612.

If, however, the instrument, in the granting part of it, be in the name of the agent only, it will not become the deed of the principal by being signed and sealed "C D, attorney to A B," *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198, 203; *Martin v. Flowers*, 8 Leigh (Va.), 158; *Townsend v. Hubbard*, 4 Hill, 351; *Squier v. Norris*, 1 Lans. 282, and cases cited; *Briggs v. Partidge*, 7 J. & Sp. 339.

The strictness observed in relation to the execution of sealed instruments is not generally enforced as to writings not under seal; and the general rule is, that if the name of the principal appears in the instrument, and the intention, on the whole, be apparently to bind him, he will be the party bound, if the agent had due authority for that purpose, even though the instrument be signed in the agent's name only. *Townsend v. Hubbard*, 4 Hill, 351, 357; *Evans v. Wells*, 22 Wend. 324; *Pinckney v. Hagadorn*, 1 Duer, 89; 14 N. Y. (4 Kern.) 590; *New England Marine Ins. Co. v. De Wolf*, 8 Pick. 56-63; *Andrews v. Estes*, 11 Me. 267; *Farmers and Mechanics' Bank v. Troy City Bank*, 1 Doug. (Mich.) 458, 467; *Robertson v. Pope*, 1 Rich. (S. C.) 501.

But a contract, although made and signed by a duly author-

ized agent, is not binding upon the principal, where the contract does not refer to him, and is not signed in his name. *Squier v. Norris*, 1 Lans. 282; *Wood v. Goodridge*, 6 Cush. (Mass.) 117; *Minard v. Mead*, 7 Wend. 68; *Galusha v. Hitchcock*, 29 Barb. 193; *Bartlett v. Tucker*, 104 Mass. 336; S. C., 6 Am. Rep. 240.

In regard to commercial contracts and paper, which are frequently drawn up in a loose and inartificial manner, a more liberal rule prevails; and, in cases of that nature, if it can collect from the whole instrument that the intention was to bind the principal, and not to bind the agent, the courts will adopt that construction of it, however informally such intention may have been expressed. *Babcock v. Beman*, 11 N. Y. (1 Kern.) 200; *Bank of Genesee v. Patchin Bank*, 19 N. Y. (5 Smith) 312; *Long v. Colburn*, 11 Mass. 97; *Rice v. Gove*, 22 Pick. 158; *Haskins v. Edwards*, 1 Iowa, 429; *Key v. Parnham*, 6 Harr. & J. 418; *Means v. Swormstedt*, 32 Ind. 87; S. C., 2 Am. Rep. 330, 332, 333, *n.*

If a person is acting as a mere agent, and he would avoid a personal liability upon the instrument signed by him, he must be careful that the instrument shows clearly on its face that he is acting as an *agent* on behalf of the named principal; for, if he signs in any other character, he will assume a personal liability, and the descriptive words will be treated as a mere description of the person signing. *Forster v. Fuller*, 6 Mass. 58; *Simonds v. Heard*, 23 Pick. 120; *Savage v. Rix*, 9 N. H. 263; *Fogg v. Virgin*, 19 Me. 352; *Brochway v. Allen*, 17 Wend. 40; *De Witt v. Walton*, 9 N. Y. (5 Seld.) 571; *Cleveland v. Stewart*, 3 Kelly, 283; *Trask v. Roberts*, 1 B. Monr. 201.

Where a contract is made by a person who describes himself as an officer of some corporation or institution, such as president, cashier, trustee, or the like, it cannot in all cases be determined from that descriptive title alone, whether the act is on a personal, or an official account, and the question must be decided upon the form of the contract, or from extrinsic circumstances.

The rule as to the admission of parol evidence of extrinsic circumstances has been stated thus: "Where the names of both principal and agent appear on the instrument, and the contract, though in the name of the agent, discloses a reference to the business of the principal, so that the instrument, as it stands, is consistent with either view, of its being the engagement of the principal or of the agent, parol evidence is admissible in a suit

against the agent to charge him by showing either that credit was given to him, or that he had not authority to bind the principal by that contract, which would create a consideration for a liability on his part, or to discharge him by proving that the consideration passed directly to his principal, as, that credit having been given to the principal alone, the consideration of the note signed by him was an antecedent liability on the part of the principal, and that the other party knew that he acted as agent, and thus destroying all consideration for a liability on his part; and in like manner, to charge or discharge the principal by similar circumstances." 1 Am. Lead. Cas. (638), 763, 764; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Bank of Utica v. Magher*, 18 Johns. 341; *Stanton v. Camp*, 4 Barb. 274; *Randall v. Snyder*, 1 Lans. 163; *Underhill v. Gibson*, 2 N. H. 352; *Wyman v. Gray*, 7 Harr. & J. 409; *Lazarus v. Shearer*, 2 Ala. 719; *Cleveland v. Stewart*, 3 Kelly, 283, 297; *Kean v. Davis*, 1 Zab. (N. J.) 683; *Taylor v. Williams*, 17 B. Monr. 489; *Sayre v. Nichols*, 7 Cal. 53.

But, if the name of the principal does not appear in the instrument, and the instrument is without ambiguity, and asserts a positive liability on the part of the person contracting, parol evidence to bind the principal, or to discharge the agent, is not admissible. *Fenly v. Stewart*, 5 Sandf. 101, 109; *Savage v. Rix*, 9 N. H. 263, 270; *Bank of British North America v. Hooper*, 5 Gray, 567; *Bartlett v. Tucker*, 104 Mass. 336; S. C., 6 Am. Rep. 240; *Nash v. Towne*, 5 Wall. 689, 703.

Though it has been held, that, in such a case, parol evidence is admissible to charge the principal, but not to discharge the agent from liability. *Coleman v. First National Bank of Elmira*, 53 N. Y. (8 Sick.) 388, 393; *Ford v. Williams*, 21 How. (U. S.) 287; *Nash v. Towne*, 5 Wall. 703; *Higgins v. Senior*, 8 M. & W. 834; see 9 Eng. Rep. 16, Moak's note; Whart. on Agency, § 298.

§ 4. Agency coupled with an interest. Notwithstanding the general rule, that an agent ought to make contracts in the name of his principal; or to show who is the principal, and that he acts as agent; there are cases in which the agent may act and enter into contracts in his own name. If the agency is one in which the agent has an interest, it survives, and the contracts in relation to it may be executed in the name of the agent after the death of the principal. *Hunt v. Rousmanier's Admrs.*, 8 Wheat. 174, 202, 206; S. C., 2 Mason, 244; 3 id. 294; 1 Peters, 1; *Taylor*

v. *Benham*, 5 How. (U. S.) 233, 267, 268, 269. See Factors; Revocation, etc.

§ 5. Agent must act within the scope of his authority. Although an agent may employ the usual and necessary means of carrying the agency into effect (*ante*, 221, § 2), this rule is limited by the principle that the acts done are within the scope of the authority conferred upon him by the principal. And, if the act substantially varies from, or exceeds, the authority, in nature, extent, degree, or legal effect, it will not bind the principal. *Dozier v. Freeman*, 47 Miss. 647. An authority to sign a note for two hundred and fifty dollars, at six months, is not well executed by signing the principal's name to a note for that sum, at sixty days, and he will not be bound by it. *Batty v. Carswell*, 2 Johns. 48; *Tate v. Evans*, 7 Mo. 419. So an authority to accept a bill of exchange for two thousand dollars, to be used for a particular purpose, is not binding if the bill is accepted for a part of that amount, to be used for another purpose. *Nixon v. Palmer*, 8 N. Y. (4 Seld.) 398.

An authority to bargain and sell lands does not authorize the agent to permit the purchaser to enter and cut timber before the execution of a conveyance of the lands. *Hubbard v. Elmer*, 7 Wend. 446. An authority to sell a horse, or to exchange it for another horse fit for staging, does not render the principal liable upon a warranty made by the agent upon an exchange of the horse for a span of ponies not fit for staging. *Scott v. McGrath*, 7 Barb. 53.

The cases upon this subject are very numerous, and they meet nearly all questions that may arise. See, also, *ante*, 221, and 1 Am. Lead. Cas. 680-688 (5th ed.). The powers of a special agent are limited by the terms in which they are conferred, and must be strictly pursued. *Martin v. Farnsworth*, 49 N. Y. (4 Sick.) 555; *Hoffman v. Treadwell*, 2 N. Y. S. C. (T. & C.) 57. But they must be construed according to the spirit as well as the letter. *Taylor v. Harlow*, 11 Barb. 232.

§ 6. What diligence and skill required. As a contract of agency is one for the benefit of both parties, an agent is understood to contract for reasonable skill and ordinary diligence, and for injuries caused to his principal by the want of such skill, or by reason of a want of ordinary care, he will be liable. *Redfield v. Davis*, 6 Conn. 442; *Burrill v. Phillips*, 1 Gall. 360-363; *Leverick v. Meigs*, 1 Cow. 645; *Kempker v. Roblyer*, 29 Iowa,

274; *Huff v. Hatch*, 2 Dis. (Ohio) 63; *Myles v. Myles*, 6 Bush (Ky.), 237.

By reasonable skill is understood such skill as is ordinarily possessed and employed by persons of common capacity, who are engaged in the same trade, business or employment. *Howard v. Grover*, 28 Me. 97; *Smothers v. Hanks*, 34 Iowa, 286; *McCandless v. McWha*, 22 Penn. St. 261; *Simonds v. Henry*, 39 Me. 155; *Evans v. Watrous*, 2 Port. (Ala.) 205; *O'Barr v. Alexander*, 37 Ga. 195; *Stevens v. Walker*, 55 Ill. 151.

By ordinary diligence is meant that degree of diligence which persons of common prudence ordinarily use in their own business, or in the same employment or profession. *Cass v. Boston & Lowell R. R. Co.*, 14 Allen, 448; *Lichtenheim v. Boston & Providence R. R. Co.*, 11 Cush. 70; *Parke v. Lowrie*, 6 Watts & Serg. 507; *Chandler v. Hoyle*, 58 Ill. 46; *Robinson v. Illinois, etc., R. R. Co.*, 30 Iowa, 401; *Mechanics' Bank v. Merchants' Bank*, 6 Metc. 13, 26.

If a principal employs one whom he knows to be incompetent to conduct his business properly, it is his own folly and he must bear the loss. *Wakeman v. Hazelton*, 3 Barb. Ch. 148.

§ 7. **Incidental duties of agents.** There are duties which the law imposes upon an agent without any express stipulations on the subject. And one of these duties of an agent is to keep his principal informed of his acts, and to inform him within a reasonable time, of sales made, and to give him timely notice of all facts and circumstances, which may render it necessary for him to take measures for his security; and in case of a neglect to do so, he will be liable for the loss caused by his negligence. *Clark v. Bank of Wheeling*, 17 Penn. St. 322; *Forrestier v. Boardman*, 1 Story, 44, 56; *Dodge v. Perkins*, 9 Pick. 368.

An agent has no right to mix the funds of his principal with his own, and then hold the principal liable for the depreciation of money in his hands. *Webster v. Pierce*, 35 Ill. 158. Or for its loss by theft. *Bartlett v. Hamilton*, 46 Me. 435; *Massachusetts Life Ins. Co. v. Carpenter*, 2 Sweeney, 734. So when an agent deposits in his own name the money of his principal, the agent must bear the loss in case of the failure of the bank. *Cartmell v. Allard*, 7 Bush (Ky.), 482; *Hammon v. Cottle*, 6 Serg. & R. 290; *Matter of Stafford*, 11 Barb. 353; *Macdonnell v. Harding*, 7 Sim. 178; *Norris v. Hero*, 22 La. Ann. 605; *Case v. Abeel*, 1 Paige, 393.

§ 8. **Instructions to agents.** Where the authority of an agent is limited by instructions, it is his duty to adhere faithfully to them, in all cases in which they ought properly to be applied ; and if he unnecessarily exceeds his commission or powers, or risks the property of his principal without authority, he renders himself responsible to his principal for all loss or damage which naturally results from his acts. *Dwight v. New York Central R. R. Co.*, 33 N. Y. (6 Tiff.) 610 ; *Scott v. Rogers*, 31 N. Y. (4 Tiff.) 676 ; 4 Abb. Ct. App. 157 ; *Wilson v. Wilson*, 26 Penn. St. 393 ; *Courcier v. Ritter*, 4 Wash. C. C. 551 ; *Hall v. Storrs*, 7 Wis. 253 ; *Whitney v. Merchants' Union Express Co.*, 104 Mass. 152 ; 6 Am. Rep. 207.

It is the duty of a principal to give his instructions in clear and direct language ; for it is but a reasonable principle of interpretation, as well as a requirement of justice, that instructions should not be construed as intended to be obligatory, unless they are distinct, positive and express, and that an agent should not be made liable for a departure from the will of his principal, where his orders are ambiguous, doubtful, or are not explicit. *Vianna v. Barclay*, 3 Cow. 281 ; *Jervis v. Hoyt*, 2 Hun, 637 ; S. C., 5 N. Y. S. C. (T. & C.) 199 ; *DeTastet v. Crousillat*, 2 Wash. C. C. 132, 137 ; *Bessent v. Harris*, 63 N. C. 542 ; *Foster v. Rockwell*, 104 Mass. 167 ; *Long v. Pool*, 68 N. C. 479 ; *Marsh v. Whitmore*, 21 Wall. 178.

Where the instructions are clear, precise, and imperative, they ought to be followed strictly, or, as has been held, *exactly*. *Wilson v. Wilson*, 26 Penn. St. 393 ; *Williams v. Higgins*, 30 Md. 404 ; *Rechtscherd v. Accommodation Bank of St. Louis*, 47 Mo. 181 ; *Brown v. McGran*, 14 Peters, 479 ; *Blot v. Boiceau*, 3 N. Y. (3 Comst.) 78.

That the agent intended to benefit his principal, is no legal excuse for disregarding his explicit instructions. *Rechtscherd v. Accommodation Bank of St. Louis*, 47 Mo. 181 ; *Evans v. Root*, 7 N. Y. (3 Seld.) 186 ; *Scott v. Rogers*, 4 Abb. Ct. App. 157 ; 31 N. Y. (4 Tiff.) 676.

There are exceptions to the rule that an agent is bound to observe or obey his instructions ; for, if by some sudden emergency, or supervening necessity, or other unexpected event, it becomes impossible for the agent to comply with his instructions, or a literal compliance with them would frustrate the objects of the principal, and amount to a sacrifice of his interests, it is the duty of the agent, under such circumstances, to do the best he

can, in the exercise of a sound discretion, to prevent a loss to his principal; and, if he acts in good faith, and exercises a reasonable discretion, his acts will bind his principal. *Greenleaf v. Moody*, 13 Allen, 363; *Forrestier v. Bordman*, 1 Story, 43, 51; *Williams v. Shackelford*, 16 Ala. 318; *Liotard v. Graves*, 3 Caines, 226; *Dusar v. Perit*, 4 Binn. 361.

An agent is not bound to follow instructions which require him to do an illegal or immoral act. Story on Agency, § 195; Whart. on Agency, § 542.

But a principal who employs an agent to do an illegal act is responsible for the injury done, whether the agent acts innocently or maliciously. *Hynes v. Jungren*, 8 Kans. 391; *Enos v. Hamilton*, 24 Wis. 658.

§ 9. **Effect of usage.** In the absence of instructions, and where there is a known usage of trade, or a mode of transacting business, applicable to the particular agency, it is the duty of the agent to conform to it; and any unnecessary departure from it will be at his risk. *Ayrault v. Pacific Bank*, 47 N. Y. (2 Sick.) 570; S. C., 7 Am. Rep. 489; *Bank of Utica v. McKinster*, 11 Wend. 473; *Tyson v. State Bank*, 6 Blackf. 225; *Thompson v. Bank of the State*, Riley, 81; S. C., 3 Hill (S. C.), 78.

In such cases, if the agent acts in accordance with legal usages he will not be liable for negligence. *Carter v. Cunningham*, 7 Metc. 491; *Parke v. Lowrie*, 6 Watts & Serg. 507; *Wallace v. Bradshaw*, 6 Dana, 382; *McMasters v. Pennsylvania R. R. Co.*, 60 Penn. St. 374; S. C., 8 Am. Rep. 264.

The instances, in which an agent will be liable for neglecting to act according to the usages of the profession, trade or business in which he is employed, are numerous and varied. He must possess ordinary skill, and use reasonable diligence (*ante*, 240); and a knowledge of the established and well-known usages of the place or business in which he is engaged is but a reasonable requirement for the protection of the principal's rights. There is no class of agents, and no kind of service which an agent can render, to which this rule does not apply.

§ 10. **Of sub-agents or substitutes.** It is an established general rule, that an agent cannot delegate his authority, *ante*, 215. But there are cases in which he may employ another to aid him, or to perform an act which is merely mechanical or instrumental, and in subordination to the direction of the agent. *Commercial Bank of Lake Erie v. Norton*, 1 Hill, 501; *Williams v. Woods*, 16 Md. 220.

In addition to this, it is not unusual for letters of attorney, or other instruments, to provide for the employment of sub-agents or substitutes. In such cases, the original agent or attorney is not liable for the acts or the omissions of such sub-agent or substitute, as he may appoint or employ, unless in making such appointment he is guilty of fraud, or of gross negligence, or improperly co-operates in such acts or omissions by the sub-agent.

Besides this express authority, there are many other cases in which a similar authority may arise by implication, from the conduct of the parties, or from the usages of trade.

It has been held, that where a draft which is payable at a distant place, is left with a bank for collection, it must be presumed that it was intended to be transmitted to a sub-agent, at the place where it is payable, and not that the bank is to employ its own officers to proceed there, for the purpose of obtaining payment. *Dorchester and Milton Bank v. New England Bank*, 1 Cush. (Mass.) 177.

But it has also been held, that a bank which receives a note for collection, whether payable at its counter, or elsewhere, is liable for any neglect of duty by which any of the parties are discharged; and, that a notary employed by the bank to present the note, and to give the proper notices to charge the parties, is the agent of the bank, and not of the depositor or owner of the paper; although such liability may be varied by express contract, or by implication from general usage. *Ayrault v. Pacific Bank*, 47 N. Y. (2 Sick.) 570; S. C., 7 Am. Rep. 489; see, also, *Palmer v. Holland*, 51 N. Y. (6 Sick.) 416; S. C., 10 Am. Rep. 616.

If a principal directs his agent to sell goods at public auction, and the sale cannot be made except by a licensed auctioneer, the authority to employ such an auctioneer will be implied. *Laussatt v. Lippincott*, 6 Serg. & R. 386-394; 1 Am. Lead. Cas. 805, 5th ed. See *ante*, 243, § 9, Usage, etc.

§ 11. Losses; by whom borne. Inasmuch as the lawful and proper acts of the agent are the acts of the principal, and since the principal is entitled to all the advantages which may be derived or result from the agent's acts; so, on the other hand, he must submit to those losses which occur in the course of the agency. *De Arcy v. Lyle*, 5 Binn. 441-455; 1 Am. Lead. Cas. 856, 5th ed. Where the agent has sold goods according to instructions, or in accordance with the usual course of trade, and

with proper diligence, he will not be liable for any loss which results from the subsequent insolvency of the purchaser. *Ante*, 223, § 2.

An agent who deposited in his own name, Confederate money, which he had collected for his principal, was held not liable for the loss of the money arising from the insolvency of the bank on the failure of the Confederacy, especially as the duty of transmittal to his principal was suspended by the war. *Hale v. Wall*, 22 Gratt. (Va.) 424.

A collecting officer or agent, who is not instructed to the contrary, is authorized to receive, in payment of such debts as he may have to collect, whatever kind of currency is received by prudent business men, for similar purposes, as where a clerk and master, in one of the seceded States, in the year 1863, received Confederate currency in payment of the purchase-money, due for land, sold in 1858. *Baird v. Hall*, 67 N. C. 230; *Russell v. Hankey*, 6 Term Rep. 12.

A principal who intrusts an agent with money for investment, but who subsequently instructs him not to invest it, renders the agent a mere depository, who is liable for gross neglect only; and, therefore, if the funds begin to depreciate while in the agent's hands, it is not his duty to return or offer to return the money to his principal, when the latter has equal facilities with the agent for knowing of the depreciation of the funds. *Richardson v. Futrell*, 42 Miss. 525. A letter sent by mail to an agent at a distant place, directing him to "forward" the proceeds of a note when collected, authorizes the agent to send the money in a letter, by mail, and if the money is never received by the principal, it will be his loss, not that of the agent. *Buell v. Chapin*, 99 Mass. 594. But if an agent remits the money of his principal in a manner unauthorized between them, it will be done at the risk of the agent. *Kerr v. Cotton*, 23 Tex. 411; *Burr v. Sickles*, 17 Ark. 428; *Ferris v. Paris*, 10 Johns. 285.

An agent who places his principal's funds in the hands of a third person, subject to the principal's drafts for the amount, is not liable for a loss of the funds by the insolvency of the depository, if he has exercised reasonable prudence in the choice of the depository. *Hammond v. Cottle*, 6 Serg. & R. 290; *Knight v. Plimouth*, 3 Atk. 480.

§ 12. **Adverse interest by agent.** In the employment of an agent, the principal bargains for the disinterested skill, diligence, and zeal of the agent for his own exclusive benefit. And when-

ever an agent is employed, the principal is entitled to the intelligence, experience, care, skill and diligence of the agent without any conflicting interests on his part to prejudice the rights of such principal. *Bain v. Brown*, 56 N. Y. (11 Sick.) 285.

An agent cannot act for his principal and for himself in the same transaction, by being both buyer and seller of property. And an agent to sell cannot himself become the purchaser. *Bain v. Brown*, 56 N. Y. (11 Sick.) 285; *Bartholomew v. Leach*, 7 Watts, 472; *Grumley v. Webb*, 44 Mo. 444; *Walker v. Palmer*, 24 Ala. 358; *Blount v. Robeson*, 2 Jones' Eq. (N. C.) 73; *Armstrong v. Elliott*, 29 Mich. 485; *Mason v. Bauman*, 62 Ill. 76; *Collins v. Case*, 23 Wis. 230; *Gaines v. Allen*, 58 Mo. 541.

So an agent employed to purchase cannot sell his own property to the principal. *Conkey v. Bond*, 34 Barb. 276; 36 N. Y. (9 Tiff.) 427; 3 Abb. (N. S.) 415; 2 Trans. App. 200; *Gould v. Gould*, 36 Barb. 270.

Although an agent employed to sell, cannot buy for himself, he may, where he is employed to sell property at auction, bid on the property on behalf of a third person. *Scott v. Mann*, 36 Tex. 157. But one who acts as an agent for the owner of property has no right to act as the agent of others for the purchase of the property, nor to take any advantage of the confidence which his position inspires, to obtain the title himself. *Moore v. Mandlebaum*, 8 Mich. 433.

The rule of equity which prohibits purchases by parties placed in a situation of trust or confidence with reference to the subject of purchase, is not confined to trustees or others who hold the legal title to the property to be sold; nor is it confined to a particular class of persons, such as guardians, trustees, attorneys or solicitors. It is a rule which applies universally to all who come within its principle; which principle is, that no party can be permitted to purchase an interest in property and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use.

Van Epps v. Van Epps, 9 Paige, 237, 241; *Blake v. Buffalo Creek R. R. Co.*, 56 N. Y. (11 Sick.) 485, 491; *Michoud v. Girod*, 4 How. (U. S.) 503; *Ringo v. Binns*, 10 Pet. 269; *Krutz v. Fisher*, 8 Kans. 90; 9 id. 501; *Grumley v. Webb*, 44 Mo. 444; *Parker v. Vose*, 45 Me. 54; *Kerfoot v. Hyman*, 52 Ill. 512; *Moore v. Moore*, 5 N. Y. (1 Seld.) 256; *Lytle v. Beveridge*, 58 N. Y. (13 Sick.) 592, 606.

An agent may lawfully purchase from his principal, if there is no fraud in the transaction. *Fisher's Appeal*, 34 Penn. St. 29.

In making a contract which requires the exercise of judgment or discretion, a person cannot act as the agent of both parties; and where he undertakes to do so, a court of equity will avoid the contract upon the application of either of the parties. *New York Central Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. (4 Kern.) 85; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 197, 204.

An agent cannot act for both parties in making a contract, where he is invested with a discretion by each, and when each of them is entitled to the benefit of his skill and judgment. *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. 132.

It is irregular for the same person to appear as attorney for both parties on the return of a summons issued by a justice of the peace. *Sherwood v. Saratoga, etc., R. R. Co.*, 15 Barb. 650; *Herrick v. Catley*, 1 Daly, 512; S. C., 30 How. 208. But there may be cases in which counsel may act as such, for both parties at the same time; and, the fact that a contract is drawn by and under the advice of one, who, at the time, is counsel for one of the parties, when such fact is known to the other party, does not, in the absence of evidence of fraud or unfairness, invalidate or affect the contract. *Joslin v. Cowce*, 56 N. Y. (11 Sick.) 626.

A person cannot act as agent for both purchaser and seller, and earn a compensation from each, unless by a distinct arrangement between all who are concerned. *Dunlop v. Richards*, 2 E. D. Smith, 181; *Watkins v. Cousall*, 1 id. 65; *Lloyd v. Calston*, 5 Bush (Ky.), 587.

The law does not forbid a broker or real estate agent from acting as the agent of both parties, where it is done without concealment or other fraud; and, if both vendor and purchaser employ the same agent, with a knowledge that he is employed by, and is acting for, both, his acts will be upheld, and he may recover a compensation from both parties. *Rowe v. Stevens*, 3 Jones & Sp. 189; *Spyer v. Fisher*, 5 id. 93.

But, a broker who has acted for both parties in negotiating an exchange of real estate between them, without informing either that he was employed by the other is not legally entitled to commissions for his services. *Farnsworth v. Hemmer*, 1 Allen, 494; *Pugsley v. Murray*, 4 E. D. Smith, 245.

So, a broker who is employed to sell or exchange property, with a written promise of pay if he finds a customer to whom a

sale or exchange is effected, is in effect the agent of the owner, and cannot act for the customer ; and, if he exacts from the latter a conditional promise of compensation before sending him to the owner, he cannot recover pay from the owner for his services, even if a sale or exchange is effected. *Maker v. Osgood*, 98 Mass. 348.

So a person who is employed by a steamship company to examine a vessel which it proposes to purchase, cannot make a valid conditional contract with the owner of the vessel for a specified compensation in case a sale is made to the company ; such a contract is in conflict with the agent's duty to the company, and therefore void. *Place v. Greenman*, 6 N. Y. S. C. (T. & C.) 681 ; S. C., 4 Hun, 660 ; *Everheart v. Searle*, 71 Penn. St. 256.

A person who brings together a buyer and a seller, each of whom has agreed, without the knowledge of the other, to pay him a commission on any contract made, and a contract is made, in the making of which such person takes no part as agent for either, but acts as a mere middleman, his concealment from each of the agreement with the other is not fraudulent, and he may recover from each the commissions agreed upon. *Rupp v. Sampson*, 16 Gray, 398. So an agent who is employed by different owners to sell two parcels of real estate, if he brings about an interview between the owners, who make an exchange, and the agent has no agency in the exchange, except in bringing about the interview and writing the deeds, he may recover the customary compensation from each party. *Mullen v. Keetzleb*, 7 Bush (Ky.), 253 ; see *Stewart v. Mather*, 32 Wis. 344.

A contract made by an individual as the agent of both parties, is not void, but merely voidable, at the election of the principal, if he comes into court within a reasonable time, but, unless repudiated within a reasonable time, the objection will be waived. *Greenwood v. Spring*, 54 Barb. 375 ; see *Bruce v. Davenport*, 1 Abb. Ct. App. 233 ; 3 Keyes, 472 ; 3 Trans. App. 82 ; 5 Abb. (N. S.) 185.

A person who voluntarily employs the agent of another, knowing the fact of such existing agency, is estopped from setting up the rule that the same person cannot be the agent of two principals who have conflicting interests. *Fitzsimmons v. Southern Express Co.*, 40 Ga. 330 ; S. C., 2 Am. Rep. 577.

It is a rule of extensive application that where a person is actually or constructively an agent for another, all profits and

* *Siegel v. Gould*, 7 Lans. 177.

advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employer. *Dutton v. Willner*, 52 N. Y. (7 Sick.) 312; *Minnesota Central R. R. Co. v. Morgan*, 52 Barb. 217, affd.; 6 Alb. Law Jour. 173; *Eshleman v. Lewis*, 49 Penn. St. 410; *Leake v. Sutherland*, 25 Ark. 219; *White v. Ward*, 26 id. 445; *Fisher v. Krutz*, 9 Kans. 501; 8 id. 90-98; *Bunker v. Miles*, 30 Me. 431. But one who constitutes another his agent to purchase a piece of land, may agree to pay him a specified sum if he obtains the land, and that the agent may make the best bargain he can in the purchase, without any liability to account to the principal for the profit of the transaction, provided there is no taint of fraud. *Anderson v. Weiser*, 24 Iowa, 428. And a principal cannot recover from his agent, as profits belonging to the former, such mere gratuities as have been received by the agent for incidental benefits derived from services rendered by the agent for his principal, where neither the principal nor the agent had any legal claim for the amount so received. *Aetna Ins. Co. v. Church*, 21 Ohio St. 492.

Although a person cannot properly be the agent of both parties, yet if he accepts the position of agent for the buyer without disclosing the fact that he is also agent for the seller, he cannot afterward repudiate such position for the purpose of shielding himself from liability to the buyer, on the ground that he was the agent of the seller. *Cottom v. Holliday*, 59 Ill. 176. So where one undertakes, without consideration, to sell the property of another with his consent, and he then procures a sale of it at a less price than the purchaser was willing to give, and is rewarded by the latter for so doing, he will be liable to the owner for the loss thus sustained. *Hunsager v. Sturgis*, 29 Cal. 142.

ARTICLE VI.

OF THE LIABILITIES OF AGENTS TO THEIR PRINCIPALS.

Section 1. In general. The duties of agents have been noticed in a preceding article, *ante*, 235, art. 5, and in this place the subject of an agent's liabilities to his principal will be considered. As has been seen, *ante*, 235, the law requires an agent to act in entire good faith toward his principal; and it also requires him to possess competent knowledge and proper skill in such business as he undertakes to perform. For the want of good faith, skill, or diligence, or for a violation of his duties or obligations to his principal, whether it be by exceeding his authority or by

positive misconduct, or by mere negligence or omission in the discharge of the duties or offices of his agency, or in any other manner, he will be liable to his principal for any loss or damage that may result to him in consequence. To maintain an action against an agent, it is not necessary to show fraud upon his part, for an agent is liable for neglecting to perform a duty which he has undertaken; and he is bound, not only to good faith, but to exercise reasonable diligence, and to possess such skill as is ordinarily possessed by persons of common capacity engaged in the same business. *Heineman v. Heard*, 50 N. Y. (5 Sick.) 27; 2 Hun, 324; 4 N. Y. S. C. (T. & C.) 666.

To sustain a contract of sale between principal and agent, upon a purchase made by the agent, of property which formed the subject of his agency, it must appear that the transaction was fair and honest, on his part, and that before the sale he disclosed to his principal such knowledge as he possessed concerning its value, unless the principal dispensed with that duty. *Brown v. Post*, 1 Hun, 303; *Ringo v. Binns*, 10 Peters, 289; *Michoud v. Girod*, 4 How. (U. S.) 503; *Condit v. Blackwell*, 22 N. J. Eq. 481; *Comstock v. Comstock*, 57 Barb. 453; *Norris v. Taylor*, 49 Ill. 18.

An agent who is guilty of a fraud, or of a neglect of duty, in consequence of which his principal's property, which is the subject of his agency, is sold, cannot become a purchaser upon such sale. *ib.* *McMahon v. McGraw*, 26 Wis. 614; *Eldridge v. Walker*, 60 Ill. 230; *White v. Ward*, 26 Ash. 445; *Grumley v. Webb*, 44 Mo. 444.

To render an agent liable to his principal, it is not necessary that the loss or damage should be caused by the direct or immediate act or omission of the agent. If he knowingly deposits goods in an improper place, and they are destroyed by an accidental fire, or are injured by water, he will be liable to his principal for the loss. *Powers v. Mitchell*, 3 Hill, 545; *Stevens v. Boston & Maine R. R.*, 1 Gray, 277.

But warehousemen are not liable for the neglect of their servants, in not rescuing goods in the warehouse, which are destroyed by an accidental fire in the night, when the servants are present, but not in the course of their employment. *Aldrich v. Boston & Worcester R. R. Co.*, 100 Mass. 31; S. C., 1 Am. Rep. 76; *Norway Plains Co. v. Boston & Maine R. R.*, 1 Gray, 263.

A paid agent, who, by mistake, satisfies for his principal a mortgage for an amount less than is actually due upon it, is

liable to pay the deficiency to his principal. *Kempker v. Roblyer*, 29 Iowa, 274. An agent, though having the fullest authority and discretion, consistent with good faith, is liable, if he acts unfaithfully, or grossly mismanages the business intrusted to him. *Myles v. Myles*, 6 Bush (Ky.), 237. So he is liable for disregarding express and positive instructions as to investing money, if the securities he takes are not good. *Williams v. Higgins*, 30 Md. 404. An agent who collects money, and receives illegal or depreciated currency in discharge of legacies or debts, is liable, in good money, for the full amount of the debts or legacies. *Turner v. Turner*, 36 Tex. 41.

A cashier of a bank who neglects to make demand of payment of a note, and thus discharges the indorser, who is the only responsible party, is liable to the bank for the resulting damages. *Bidwell v. Madison*, 10 Minn. 13. So a bank which receives a promissory note for collection, whether payable at its counter, or elsewhere, is liable for any neglect of duty by which any of the parties to the note are discharged. *Ayrault v. Pacific Bank*, 47 N. Y. (2 Sick.) 570; S. C., 7 Am. Rep. 489; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. (3 Seld.) 459; *Commercial Bank of Pennsylvania v. Union Bank of New York*, 11 N. Y. (1 Kern.) 203; *Reeves v. State Bank of Ohio*, 8 Ohio St. 465; see, also, *Nunnemaker v. Lanier*, 48 Barb. 234.

The rule is the same where a note is delivered to an express company, for collection. *Palmer v. Holland*, 51 N. Y. (6 Sick.) 416; S. C., 10 Am. Rep. 616.

A bill of exchange transmitted by the holder to a bank as agent, for presentment to the drawee, must be presented to the drawee, and an explicit acceptance obtained, or notice given to the holder, as in case of non-acceptance, or such agent will be liable for any loss sustained by the holder. *Walker v. Bank of State of New York*, 9 N. Y. (5 Seld.) 582.

An agent who is employed to obtain orders for the construction of machinery by his principal, and who engages in a negotiation for such an order, which was broken off, without reason to suppose it would be renewed, must communicate or transmit to such principal a letter, which he received after the termination of his agency, though written before that event, and it is no excuse for not sending the letter, that the agent supposed that the principal could not comply with the order. *Edmonstone v. Hartshorn*, 19 N. Y. (5 Smith) 9.

There are cases, however, in which the loss or damage, caused

by the acts or omissions of the agent, are so remote as not to subject him to an action. *Short v. Skipwith*, 1 Brock. Cir. 103, 104; *Bell v. Cunningham*, 3 Peters, 69, 84, 85; 5 Mason, 161; *Smith v. Condry*, 1 How. (U. S.) 28.

And, to be actionable, there must be a real loss, or an actual damage, and not merely a probable or possible one. *Webster v. De Tastet*, 7 Term R. 157; *Hale v. Wall*, 22 Gratt. (Va.) 424.

§ 2. **Accounting by agents.** Where the business in which an agent is engaged, requires an account to be kept, it is his duty to keep full, regular and accurate accounts of all transactions on behalf of his principal, not only of his payments and disbursements, but also of his receipts; and to render such accounts to his principal, at all reasonable times, without any suppression, concealment or overcharge.

A neglect or refusal to render a proper account, after a reasonable notice or request by the principal, will raise a presumption against the agent, who will be presumed to have received the money upon sales made by him, if he does not render an account of them upon a reasonable demand. *Tuttle v. Mayo*, 7 Johns. 132; *Pope v. Barret*, 1 Mason, 119, 127; *Eaton v. Welton*, 32 N. H. 352; *Haas v. Damon*, 9 Iowa, 589; *Moore v. Beauchamp*, 5 Dana (Ky.), 70, 78; *Lyles v. Hatton*, 6 Gill. & J. 122, 135; *Schee v. Hassinger*, 2 Binn. 325, 331; see *Riley v. State*, 32 Tex. 763.

It is the duty of an agent, in all cases where he has collected money for his principal, to give him immediate notice of the fact. *McMahan v. Franklin*, 38 Mo. 548; *Lyle v. Murray*, 4 Sandf. 590.

An agent who has received money belonging to his principal, and unreasonably neglects to inform him of it, is liable for interest from the time when he ought to have given the information. *Dodge v. Perkins*, 9 Metc. 368; *Bedell v. Janney*, 4 Gilm. 194, 202; *Nisbet v. Lawson*, 1 Kelly, 275, 287; *Anderson v. State of Georgia*, 2 Kelly, 370, 375; *Leake v. Sutherland*, 25 Ark. 219; *Clemens v. Caldwell*, 7 B. Monr. 171.

Where an agent has his principal's money in his hands, it is not enough that he merely renders an account; he ought also to promptly pay over the money to his principal. And an agent who has received money for the use of his principal is bound to pay it over to him, and he has no right to return it to the person from whom he received it, for he will not be permitted to dispute the title of his principal by setting up an adverse title to it in a

stranger. *Hancock v. Gomez*, 58 Barb. 490; S. C., 50 N. Y. (5 Sick.) 668; *Ross v. Curtis*, 31 N. Y. (4 Tiff.) 606; *People ex rel. Martin v. Brown*, 55 N. Y. (10 Sick.) 180; *Bain v. Clark*, 39 Mo. 252; *Day v. Southwell*, 3 Wis. 657.

So where money, which could not by law have been recovered by the principal, is voluntarily paid over to the agent by the party who could not have been compelled to pay it, the money becomes the property of the principal, in the agent's hands, for which he must account, and he cannot defend an action for it upon the ground that the money was paid on an illegal contract between the principal and the party paying the money. *Murray v. Vanderbilt*, 39 Barb. 140; *Baldwin v. Potter*, 46 Vt. 402; *Chinn v. Chinn*, 22 La. Ann. 599; *Mayor of Auburn v. Draper*, 23 Barb. 425; *Daniels v. Barney*, 22 Ind. 207.

A factor who has received the money upon sales made by him is not bound to remit it until a demand of it is made, or the principal has given him instructions as to the time and mode of remitting, for he is not bound to take upon himself the hazard of a remittance, which, should he act without authority, the law would cast upon him. *Brink v. Dolsen*, 8 Barb. 337; *Cooley v. Betts*, 24 Wend. 203; *Ferris v. Paris*, 10 Johns. 285; *Hall v. Peck*, 10 Vt. 474; *Burr v. Sickles*, 17 Ark. 428.

But a demand is not required where an agent denies his liability as agent. *Tillotson v. McCrillis*, 11 Vt. 477, 480.

Nor where he has neglected to render an account at reasonable times, and to keep his principal properly advised as to the condition of the agency, or he is otherwise chargeable with some default, neglect or breach of duty; or where he has received general instructions to remit at specified times, which he has neglected to do. *Hemenway v. Hemenway*, 5 Pick. 389; *Brown v. Arrott*, 6 Watts & Serg. 402, 418.

A local railroad agent who is instructed to remit daily, such sums as he might receive above a specified amount, is allowed a reasonable time, in view of his other duties, to make the remittance, and he will not be liable for money stolen from him which he did not receive in time to remit as he was instructed. *Robinson v. Illinois, etc., R. R. Co.*, 30 Iowa, 401.

In general, an action to recover money received by one in the character of trustee cannot be maintained until after a demand, or proof in some other way, that there has been an abuse of the trust. *Walrath v. Thompson*, 6 Hill, 540.

Money held as a mere deposit, whether by a bank or by an

individual, must be demanded by the depositor by a check, or otherwise, before he can maintain an action for its recovery. *Payne v. Gardiner*, 29 N. Y. (2 Tiff.) 146; *Downes v. Phoenix Bank*, 6 Hill, 297; *Johnson v. Farmers' Bank*, 1 Harr. (Del.) 117.

If a bank suspends payment, and closes its doors against its creditors, a person who has deposited money in it may maintain an action for the recovery of his deposit without first demanding payment. *Watson v. Phoenix Bank*, 8 Metc. 217, 221.

A mere collecting agent, whose duty it is to receive money and pay it over in a reasonable time, or to give notice of its collection, is liable to an action without a demand, if he neglects to pay the money over, or to give notice of its collection. *Lillie v. Hoyt*, 5 Hill, 395; *Nelson v. Kerr*, 2 N. Y. S. C. (T. & C.) 299; *Drexel & Co. v. Raimond*, 23 Penn. St. 21; *Estes v. Stokes*, 2 Rich. (S. C.) 133; *Hawkins v. Walker*, 4 Yerg. (Tenn.) 188; *Steele v. McIntosh*, 9 Ired. (N. C.) 307, 311.

Money collected by an attorney for his client must be demanded, or a direction to remit given and neglected, before an action can be maintained against him for the money. *Walradt v. Maynard*, 3 Barb. 584; *Jett v. Hempstead*, 25 Ark. 462; *Smith v. Whiteside*, 4 Yerg. (Tenn.) 192; *Nisbet v. Lawson*, 1 Kelly, 275, 281; *Rathbun v. Ingals*, 7 Wend. 320; *Taylor v. Bates*, 5 Cow. 376; *Beardslee v. Boyd*, 37 Mo. 180.

An attorney who collects money for his client holds it more in the character of a trustee than that of a debtor, and, therefore, a demand is but reasonable before he is liable to an action. *Ib.* *McDonough v. Delassus*, 10 Rob. (La.) 481, 487, 488; *Bedell v. Janney*, 4 Gilm. 194, 201; *Eaton v. Weldon*, 32 N. H. 353; *McBroom v. The Governor*, 6 Port. (Ala.) 33, 47; *Armstrong v. Smith*, 3 Blackf. 251; *Taylor v. Spears*, 1 Eng. (Ark.) 382; *Cockrill v. Kirkpatrick*, 9 Mo. 697, 704; *Haas v. Damon*, 9 Iowa, 589.

But no demand need be made of an attorney who denies his liability to pay the money to his client, and claims from him a sum greater than the amount collected. *Walradt v. Maynard*, 3 Barb. 584. But such a claim does not dispense with a demand unless the declaration is made to the client, or to his agent, nor unless it is shown to have come to the knowledge of the client before the action is brought. *Rathbun v. Ingals*, 7 Wend. 320.

ARTICLE VII.

DEFENSES OF AGENTS AGAINST PRINCIPALS.

Section 1. In general. The duties which agents owe to their principals, and their liabilities to them having been discussed in the last two articles, it will be proper now to notice some of the defenses which an agent may interpose to claims or actions by his principal. An attempt to enumerate all the instances in which a successful defense may be set up by the agent, would be difficult, if not impracticable. There are some general principles, however, which apply to large classes of cases, and some of these principles will be stated and illustrated by the adjudged cases.

§ 2. **Illegality as a defense.** There is scarcely any contract which may not be set aside or held invalid, if it can be shown that it is illegal in its nature. See *Illegality*. And where the subject-matter of the agency is an immoral or illegal transaction, or is founded in fraud or against public policy, the agent is not bound to aid in carrying into effect such an agency, and he may successfully defend any action brought against him by his principal, where the action is founded upon a neglect or refusal to assist in such illegal acts. *Webster v. DeTastet*, 7 Term R. 157; *Bezwel v. Christie*, Cowp. 395; *Catlin v. Bell*, 4 Camp. 183; *Armstrong v. Toler*, 11 Wheat. 258, 268.

But if an agent consents to act in the matter, and receives money in that capacity for his principal, he will not be permitted to retain the money on the ground of the illegality of the transaction between the principal and the party paying the money to the agent. *Ante*, 253. *Murray v. Vanderbilt*, 39 Barb. 140; *Baldwin v. Potter*, 46 Vt. 402; *Tenant v. Elliott*, 1 Bos. & Pul. 3; *Johnson v. Lansley*, 12 C. B. 468; *Bousfield v. Wilson*, 16 M. & W. 185; S. C., 16 L. J. Exch. 44; *Pointer v. Smith*, 7 Heisk. (Tenn.) 137. *Ante*, 253, § 2.

§ 3. **No damage to principal.** Although an agent should neglect or disobey the instructions of his principal, it does not follow that an action for substantial damages will always lie against him for such neglect or disobedience. The agent may show that no loss or damage has resulted to the principal from the neglect. *Ante*, 251; *Folsom v. Mussey*, 10 Me. 297; *Fomin v. Oswell*, 3 Camp. 357. See *Paley on Agency*, 74; *Story on Agency*, § 236; *Suydam v. Allen*, 20 Wend. 324; *Frothingham v. Everton*, 12 N. H. 239.

§ 4. **Necessity.** An agent who has neglected or violated his instructions may show that his acts or omissions were the result of an overwhelming necessity. *Dusar v. Pèrit*, 4 Binn. 361; *Day v. Noble*, 2 Pick. 615; *Forrestier v. Boardman*, 1 Story, 44, 51; *Greenleaf v. Moody*, 13 Allen, 363. The law does not seek to compel a man to do that which he cannot possibly perform. *Broom's Leg. Max.* 242. With respect to private rights, necessity privileges a person acting under its influence. *Ib.* 11.

§ 5. **Ratification.** It has been seen that a voluntary ratification of the acts of one who has assumed to act as agent, with a full knowledge of all the material facts in the case, will bind the principal as much as he would be bound by a previous authority to the same effect. *Ante*, 218, art. 3. This principle may also be invoked by the agent; for, where the principal, with a full knowledge of all the material facts and circumstances of the case, deliberately ratifies the acts or omissions of his agent, he will be as conclusively bound thereby as though he had originally given express authority to the agent. *Ante*, 232, art. 4, § 13; *Cairnes v. Bleecker*, 12 Johns. 300; *Vianna v. Barclay*, 3 Cow. 281; *Corning v. Southland*, 3 Hill, 552; *Towle v. Stevenson*, 1 Johns. Cas. 110; *McKinley v. Tucker*, 6 Lans. 214.

ARTICLE VIII.

LIABILITY OF AGENTS TO THIRD PERSONS, ON CONTRACTS.

Section 1. A known agent is not responsible. An agent who makes a contract in behalf of his principal, whose name he discloses at the time, to the person with whom he contracts, is not personally liable upon it. *Rathbone v. Budlong*, 15 Johns. 1; *Ferris v. Kilmer*, 48 N. Y. (3 Sick.) 300; *McClernan v. Hall*, 33 Md. 293; *Tiller v. Spradley*, 39 Ga. 35. It is in relation to written contracts or instruments that the question of an agent's liability most frequently arises; and, several of the cases showing when an agent will be liable, and when not, have been already cited. *Ante*, 236, art. 5, § 3. See, also, 1 Am. Lead. Cas. 757-764, 5th ed.

§ 2. **Agent assuming liability.** Although the law ordinarily exempts an agent from personal liability, if he acts within the scope of his authority, and properly discloses his principal's name, yet an agent is at liberty to incur a personal responsibility if he chooses to do so by his own act or contract, or where, from his own conduct, or the form of the act or contract, it is neces-

sarily implied, or created, by operation of law. And, if an express warranty that a note is genuine, is made by the agent of the seller, this will bind the agent personally, where it appears that such was the intention. *Wilder v. Cowles*, 100 Mass. 487. An agent who gives a note in his own name, with nothing upon it to indicate that he does not assume a personal liability, will be held as a principal in the note. *Snelling v. Howard*, 51 N. Y. (8 Sick.) 373. A promissory note, or a bill of exchange, in which no principal is named, but is signed "A B, agent," binds A B, only, and will not support an action against any other person. *Williams v. Robbins*, 16 Gray, 77; *Pentz v. Stanton*, 10 Wend. 271; *Bickford v. First, etc., Bank*, 42 Ill. 238; *Collins v. Buckeye Ins. Co.*, 17 Ohio St. 215; *Woodbury v. Blair*, 18 Iowa, 572. Where one professes to act as an agent and makes a contract under seal to do work for another, and he alone signs the contract, and receives the pay for the work, he will be held liable for the non-performance of the work. *Einstein v. Holt*, 52 Mo. 340.

Where one, who appears to have full control of the other business of a steamboat, hires a man to act as chief engineer, and does not disclose the fact that he is an agent, the person hired may recover his wages of him personally. *Farrell v. Campbell*, 3 Ben. 8. The cases in which an agent will be held to have assumed a personal liability, on account of the mode in which he assumed to contract, are numerous and varied. For some of these, see *ante*, 236, art. 5, § 3.

§ 3. **Agent exceeding his authority.** It has been shown that it is the duty of an agent to act within the scope of his authority. *Ante*, 236, 240, art. 5, §§ 5, 3.

If one person assumes to act as the agent of another when he possesses no authority from the principal to do so; or, if he is employed as an agent, but exceeds the authority conferred upon him, he will be personally liable to such persons as he may deal with on account of such principal. And, if an agent enters into a contract which is not binding upon his principal because he did not authorize it, the agent will be liable in damages to the person who dealt with him on the faith that he possessed the authority which he assumed; and such liability is founded upon an implied warranty by the agent that he had authority, for which the remedy is by an action for its breach. *Baltzen v. Nicolay*, 53 N. Y. (8 Sick.) 467; *White v. Madison*, 26 N. Y. (12 Smith) 117; *Collen v. Wright*, 8 Ell. & Bla. 647; S. C., 40 Eng. Law & Eq. 182.

But, to render the agent liable, the unauthorized contract must be one that could have been enforced against the principal if the agent had been authorized to make it. *Ib. Dung v. Parker*, 52 N. Y. (7 Sick.) 494. If such contract is void by the statute of frauds, it cannot be enforced directly or indirectly. *Ib.* And, even though the action is in fraud, there can be no recovery if the proof of such contract is essential to maintain the action. *Ib.*

If one falsely and fraudulently asserts that he is authorized to act as the agent of another, he will clearly be liable to such persons as may deal with him upon the faith of his assertions, if they suffer injury or damage in consequence. *Lander v. Castro*, 43 Cal. 497; *McCurdy v. Rogers*, 21 Wis. 197; *Duncan v. Niles*, 32 Ill. 532; *Taylor v. Shelton*, 30 Conn. 122; *Jefts v. York*, 4 Cush. (Mass.) 371; 10 id. 392, 395; *Hopkins v. Mehaffy*, 11 Serg. & R. 129; *Spedding v. Newell*, L. R., 4 C. P. 212; *Goldwin v. Francis*, L. R., 5 C. P. 295.

If a person falsely represents himself to be the agent of another, and to have authority to contract for him, and he does so contract without authority, the only remedy is by an action against him for the fraud or deceit. *Noyes v. Loring*, 58 Me. 208; *Bartlett v. Tucker*, 104 Mass. 336; S. C., 6 Am. R. 240; *McCurdy v. Rogers*, 21 Wis. 197. See Deceit; Fraud.

But where one undertakes to act as the agent of another, in the sincere belief that he has authority, although, in fact, he has none, he will be liable to a third party who deals with him in ignorance of his want of authority, if he suffers loss in consequence, upon the ground of an implied warranty of authority. *White v. Madison*, 26 N. Y. (12 Smith) 117; *Collen v. Wright*, 7 Ell. & Bla. 301; 8 id. 647; S. C., 40 Eng. Law & Eq. 645; *Richardson v. Williamson*, L. R., 6 Q. B. 276.

One who induces an agent to exceed his authority, and to enter into a contract which is unauthorized by his principal, cannot hold the agent personally liable upon the contract. *Aspinwall v. Torrance*, 1 Lans. 381.

§ 4. Not disclosing agency. It is the duty of every person who acts as an agent for another, to disclose that fact to the party with whom he deals, if he desires to avoid a personal liability upon the contracts he enters into.

If, at the time of making a contract, he does not disclose the fact of his agency, but deals with the other party as though he were the principal, he may be held personally liable upon his contract, at the election of the party dealing with him. *Cotton*

v. Holliday, 59 Ill. 176; *Farrell v. Campbell*, 3 Ben. 8; *Baldwin v. Leonard*, 39 Vt. 260; *Kelner v. Baxter*, L. R., 2 C. P. 174; *Mauri v. Heffernan*, 13 Johns. 58; *Winsor v. Griggs*, 5 Cush. (Mass.) 210. A factor, broker, or other agent, who buys goods in his own name for his principal, will be liable to the vendor for the price, if such agency was not disclosed. *Ib.*

But the real principal, when discovered, may be sued upon the contract, precisely as though his name had been disclosed. *Cole v. First National Bank of Elmira*, 53 N. Y. (8 Sick.) 388; *Green v. Skeel*, 2 Hun, 485; S. C., 5 N. Y. S. C. (T. & C.) 25; *Beebe v. Robert*, 12 Wend. 413; *Carney v. Dennison*, 15 Vt. 400; *Tabor v. Cannon*, 8 Metc. 456; *Clealand v. Walker*, 11 Ala. 1059.

§ 5. **Agent's liability for a foreign principal.** An agent may become responsible for the debts or contracts made for a foreign principal, if such agent assumes an express personal liability, or by omitting to disclose his agency, and the fact that he is acting for such a principal.

In many cases it is a mere question of intention whether the agent assumes a personal liability; and it is therefore a question of fact which is to be ascertained and determined by the terms of the particular contract, and the surrounding circumstances. *Green v. Kopke*, 18 C. B. 549; S. C., 3, 6 Eng. Law & Eq. 396; *Oelrichs v. Ford*, 23 How. (U. S.) 49, 65.

The mere fact that an agent acts in behalf of a foreign principal is not, of itself, a ground for imposing upon him a personal responsibility. "If, by the language of the contract, the agent and not the principal is bound, such must be its construction; and, on the other hand, if it clearly binds the principal, and is in form a contract with him only, the agent must be exonerated, without regard to the fact that the principal is resident in a foreign country." *Bray v. Kettell*, 1 Allen, 80, 83, 84; *Kirkpatrick v. Stainer*, 22 Wend. 244; *Mahony v. Kekulé*, 14 C. B. 390; *Oelrichs v. Ford*, 23 How. (U. S.) 49, 65.

Where the contract stipulates that the agent shall not be bound by it, he will not be liable, although acting for a foreign principal, whose name is not disclosed. *Oglesby v. Yglesias*, 1 Ell. Bla. & El. 930.

But where he signs a written contract, he must be careful to see that he binds his principal and not himself. *Paice v. Walker*, L. R., 5 Exch. 173, 177; and see *ante*, 238.

§ 6. **Liability of agent who contracts in his own name.** A person who enters into a contract as an agent will be personally

liable, whether he is known to be an agent or not, in all cases in which he makes the contract in his own name, or where he voluntarily incurs a personal responsibility, either express or implied. And if a firm of agents give their firm notes, with nothing upon them to show that they did not assume a personal liability, they will be treated as principals in the notes. *Snelling v. Howard*, 51 N. Y. (6 Sick.) 373; *Collins v. Buckeye Ins. Co.*, 17 Ohio St. 215; *Woodbury v. Blair*, 18 Iowa, 572.

Where a check is signed "A B, agent," this does not disclose the fact that the drawer is the agent of any one, and if that is the only indication of his agency, he will be personally bound as the drawer. *Bickford v. First Nat. Bank, Chicago*, 49 Ill. 238.

A person who signs notes as president of a bank which has no legal existence is personally liable on them. *Allen v. Pegram*, 16 Iowa, 163; see *Woodbury v. Blair*, 18 id. 572.

In those cases in which parol evidence is admissible to show whether the principal or the agent is the responsible party, *ante*, 229, the question is one of fact to be settled upon the evidence by a jury, or a court sitting in the place of a jury. *Cunningham v. Soules*, 7 Wend. 106; *Coleman v. First Nat. Bank of Elmira*, 53 N. Y. (8 Sick.) 388, 392, 393.

But to charge the agent, it must be shown affirmatively that the credit was given to him exclusively. *Butler v. Evening Mail Association*, 61 N. Y. (16 Sick.) 634.

ARTICLE IX.

OF THE LIABILITY OF PUBLIC AGENTS UPON CONTRACTS MADE BY THEM.

Section 1. The general rule. One who acts in the capacity of an agent for the government, or for the public, is not usually liable personally upon contracts made by him, even though he would be bound by such a contract, if he were acting as an agent of a private person. *McClellan v. Reynolds*, 49 Mo. 312. A public agent is protected from a personal responsibility, upon the supposition that his office excludes the presumption that any credit was given to him personally, although there may not be any other person against whom a legal remedy lies to enforce the contract.

It will not be presumed that a public agent intends to bind himself personally, nor that a party who deals with him in his public character means to rely upon his individual responsibil-

ity. *Crowell v. Crispin*, 4 Daly, 100; *Nichols v. Moody*, 22 Barb. 611; *McClellan v. Reynolds*, 49 Mo. 312; *Murray v. Carothers*, 1 Metc. (Ky.) 71.

§ 2. When a public agent is not liable. A public agent, who is known to be acting merely in that capacity, and who does not make himself liable by any thing amounting to a personal contract, is not liable for articles or things furnished upon his order. A recruiting agent, duly appointed for the purpose of enlisting soldiers, is not liable for the payment of the bounty offered, nor for the payment of the value of the soldier's services. *Hall v. Lauderdale*, 46 N. Y. (1 Sick.) 70.

One who makes a contract as a public officer, and acts honestly in that capacity, is not ordinarily liable personally; and, if his authority is defined by a public statute, all who contract with him will be presumed to know the extent of his authority, and they cannot allege their ignorance as a ground of charging him with acting in excess of his authority, unless he knowingly misleads the other party. *Newman v. Sylvester*, 42 Ind. 106; *Murray v. Carothers*, 1 Metc. (Ky.) 71. And where a statute limits the amount of an expenditure, this is notice in law and in fact to the contractor that the officers of the government cannot exceed the prescribed bounds. *Curtis v. United States*, 2 Nott. & Hnn, Ct. Claims, 144; *Baltimore v. Reynolds*, 20 Md. 1; *State v. Hastings*, 10 Wis. 518; *Hull v. County of Marshall*, 12 Iowa, 142.

A public agent who contracts by a writing which shows on its face that he is acting officially, is not bound personally (*Fox v. Drake*, 8 Cow. 191; *McClellan v. Reynolds*, 49 Mo. 312), and the rule is the same, although he does not add his official designation to his signature. *Lyon v. Adamson*, 7 Clarke (Iowa), 509. A public agent who, in his known official capacity, employs a man to work on account of the government, is not personally liable for the wages of the person employed. *Walker v. Swartwout*, 12 Johns. 444; *Nichols v. Moody*, 22 Barb. 611; *Randall v. Van Vechten*, 19 Johns. 60; *Perrin v. Lyman*, 32 Ind. 16.

A canal superintendent, who is known to be acting as such, is not personally liable for work done or materials found at his request, and on his promise to pay for them, for the repair of the canals or works therewith connected, unless it is manifest that it was the intention of the parties that he should be personally responsible. *Osborne v. Kerr*, 12 Wend. 179; *West v. Jones*, 9 Watts, 27. So of a contract by an overseer of the poor of a town,

for the support of a pauper. *Olney v. Wickes*, 18 Johns. 122. A justice of the peace who renders official services in relation to the support of the poor of the county, at the request of the county superintendents of the poor, cannot maintain an action against them for such services. *Vedder v. Superintendents, etc., of Schenectady*, 5 Denio, 564; see *Hayes v. Symonds*, 9 Barb. 260. No action will lie against an army officer, on his promise to pay a reward for apprehending a deserter, where the person performing the service knew that such promisor was a captain in the army, and acted as such in offering the reward. *Belknap v. Reinhart*, 2 Wend. 375; *Hodgson v. Dexter*, 1 Cranch, 345.

The rule which exempts such agents from a personal liability is the same whether the contract be oral, in writing, or under seal, where the contract or instrument does not show an intention to assume a personal responsibility. *Fox v. Drake*, 8 Cow. 191; *Hodgson v. Dexter*, 1 Cranch, 345, 363, 364; *Hodges v. Runyan*, 30 Mo. 491; and see the various cases that have been cited in this section.

No action can be maintained against a public agent who refuses to pay over money in his hands, although it is demanded by one to whom it ought to be paid by the principal. The agent is responsible to no one but his principal, and he owes no legal duty to a creditor of such principal. *Hall v. Lauderdale*, 46 N. Y. (1 Sick.) 70; and see *Denny v. Manhattan Co.*, 2 Denio, 115; 5 id. 639; *Colvin v. Holbrook*, 2 N. Y. (2 Comst.) 126; *Gridley v. Lord Palmerston*, 3 Brod. & Bing. 275.

But, where money is received by a public officer as a trustee, who is directed by statute to pay it over to specified bondholders, for whose benefit the money was raised, an action will lie by such bondholders against the officer. *Ross v. Curtis*, 30 Barb. 238; 31 N. Y. (4 Tiff.) 606; *People v. Brown*, 55 N. Y. (10 Sick.) 180; *Murdoch v. Aiken*, 29 Barb. 59; 25 How. 594, *n*; 31 N. Y. (4 Tiff.) 609.

§ 3. When a public agent is liable upon contracts. While there is a presumption that a public officer or agent does not intend to assume a personal liability upon contracts entered into by him in the capacity of agent, he may, if he chooses, make a contract which will bind him personally. And where a public government officer makes an express personal promise to pay for services rendered to the government, he will be personally liable. *Gill v. Brown*, 12 Johns. 385; *King v. Butler*, 15 id. 281; *Copes v. Matthews*, 10 Sm. & Marsh. 398.

Where it does not appear that an agent, in making a contract,

acted expressly or ostensibly, as a public agent, it will be deemed a private contract, upon which the agent will be liable. *Swift v. Hopkins*, 13 Wend. 313; *Van Hovenbergh v. Hasbrouck*, 45 Barb. 197.

But, where it is sought to charge a public officer or agent with a personal responsibility, the facts and circumstances ought to be such as to show clearly that both parties acted upon the assumption that a personal liability was undertaken. *lb. Gill v. Brown*, 12 Johns. 385; *King v. Butler*, 15 id. 281; *Murray v. Kennedy*, 15 La. Ann. 385.

The question to whom the credit was given is one of fact to be settled by a jury, in all cases where the terms of the contract do not clearly determine or declare whether a personal liability is assumed. *Cunningham v. Soules*, 7 Wend. 106; *Hammaraskold v. Bull*, 9 Rich. 484; *Brown v. Rundlett*, 15 N. H. 360.

If a person assumes to act as a public officer or agent, when he has no such authority, and he enters into a contract which does not bind his professed or pretended principal, he will, as in other cases of an unwarranted or assumed agency, be personally liable. *Ante*, 257; *Ives v. Hulet*, 12 Vt. 314.

§ 4. **Liability of government or principal.** The difference between the liability of an individual as a principal, and that of the government as principal, is, that the former is liable to the extent of the authority he has apparently given to his agent, while the latter is liable only to the extent of the power actually conferred upon its officer or agent. *Pierce v. United States*, 1 Nott & Hun, Ct. Claims, 270; *Lee v. Munroe*, 7 Cranch, 366.

ARTICLE X.

LIABILITY OF AGENTS FOR TORTS.

Section 1. Of their liability in general. In discussing the liabilities of an agent to third persons, for the torts or wrongs of the agent, it is important to distinguish between acts of misfeasance or positive wrongs, and nonfeasances or mere omissions of duty by the agent. The general rule of the common law is, that a servant who, by negligence in the discharge of his duties, injures a third person, he will not be personally liable to such third person for the injuries done. *Colvin v. Holbrook*, 2 N. Y. (2 Comst.) 126, 129; *Hall v. Lauderdale*, 46 N. Y. (1 Sick.) 70; *Denny v. Manhattan Co.*, 5 Denio, 639; 2 id. 115.

The injured party is not without remedy in such a case, for the principal is liable to third persons for the misfeasances, negligences, and omissions of duty of the agent, in all cases and matters within the scope of his employment. *Burns v. Poulson*, L. R., 8 C. P. 563; *Whatman v. Pearson*, 3 id. 422; *Keeney v. Grand Trunk Railway Co.*, 59 Barb. 104; 47 N. Y. (2 Sick.) 525; *Althorff v. Wolfe*, 22 N. Y. (8 Smith) 355.

A principal is liable to an action for the fraudulent misrepresentation of his agent, while acting in the course of his business. *Barwick v. English Joint-Stock Bank*, L. R., 2 Exch. 259.

The master and owner of a ship are responsible for the goods which they have undertaken to carry, if they are stolen or embezzled by the crew, or by any other person; and although no fault or negligence is imputable to them. *Schieffelin v. Harvey*, 6 Johns. 170.

A telegraph company is liable for the negligence of its agents or operatives, in the transmission of messages. *New York & Washington Printing Tel. Co. v. Dryburg*, 35 Penn. St. 298; *Dunning v. Roberts*, 35 Barb. 463; *Birney v. Washington Printing Tel. Co.*, 18 Md. 341.

The authorities enforce the maxim *respondet superior*, in those cases in which an agent is acting within the scope of his authority, and in pursuance of his principal's directions, but where, by his ignorance, unskillfulness, or negligence, he causes an injury to a third person; for such acts of the agent, the principal is liable, but no action lies against the agent by such third person.

The agent may, however, be responsible to his principal for the loss sustained by him in responding to third persons for his negligent acts.

§ 2. When agent is liable to third persons. An agent who knowingly exceeds his authority, or who intentionally deviates from it, and willfully injures the person or property of another, will be personally liable for the consequences. *Elmore v. Brooks*, 6 Heisk. (Tenn.) 45; *Wright v. Eaton*, 7 Wis. 595; *Richardson v. Kimball*, 28 Me. 463.

If the principal neither authorized, nor has ratified, a willful trespass which has been committed by one employed as his agent, he will not be liable for the agent's wrongful acts. *Vanderbill v. Richmond Turnpike Co.*, 2 N. Y. (2 Oomst.) 479; *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y. (2 Sick.) 122; 7 Am. Rep. 418.

While an agent is protected as to lawful acts done within the

scope of his authority, *ante*, 240, 263, 265, this is not the rule when he does an illegal act, even by the direction of his principal ; for, the principal himself is liable for an unlawful act, and he cannot confer upon another an authority which he himself does not possess.

In such a case, the agent is under no obligation to his principal which will require him to do an unlawful thing ; and, therefore, if he does an unlawful thing, even by the command of his principal, he will be liable for the injuries done to third persons, in the same manner that he would have been responsible if no command or direction had been given by the principal. *Wright v. Eaton*, 7 Wis. 595 ; *Richardson v. Kimball*, 28 Me. 463 ; *Elmore v. Brooks*, 6 Heisk. (Tenn.) 45 ; *Ford v. Williams*, 24 N. Y. (10 Smith) 359 ; *Burnap v. Marsh*, 13 Ill. 535 ; *Permynter v. Kelly*, 18 Ala. 716 ; *Gaines v. Briggs*, 4 Eng. (9 Ark.) 46 ; *Josselyn v. McAllister*, 22 Mich. 300 ; *Thorp v. Burling*, 11 Johns. 285 ; *Sprights v. Hawley*, 39 N. Y. (12 Tiff.) 441 ; 7 Trans. App. 14 ; 40 Barb. 397.

An agent is liable, under some circumstances, for the acts of other persons employed by him as assistants, in the performance of his own contracts or duties toward his principal. And, where an agent enters into a contract to do some particular act or thing, he will be liable for the trespass, frauds, and misfeasances of those whom he may employ as assistants, in the performance of such act or thing. A common carrier of passengers, for instance, is held to have contracted for the proper treatment of passengers, as well as for their transportation ; and he is therefore liable for the acts of such persons as he may employ in the business ; and, if such persons willfully insult or injure passengers, the carrier is responsible in damages. *Seymour v. Greenwood*, 7 H. & N. 355 ; *Bayley v. Manchester, etc., Railway Co., L. R.*, 7 C. P. 415 ; *Goddard v. Grand Trunk Railway*, 57 Me. 202 ; 2 Am. Rep. 39 ; *Bryant v. Rich*, 106 Mass. 180 ; 8 Am. Rep. 311 ; *Pittsburg, etc., R. R. Co. v. Slusser*, 19 Ohio St. 157, 162 ; *Weed v. Panama R. R. Co.*, 17 N. Y. (3 Smith) 362 ; *Day v. Owen*, 5 Mich. 520 ; *Craker v. R. R.*, 36 Wis. 657 ; 17 Am. Rep. 504. And, in this respect, the law especially protects female passengers. *Craker v. R. R.*, 36 Wis. 659 ; 17 Am. Rep. 504 ; *Nicto v. Clark*, 1 Clif. 145 ; *Chamberlain v. Chandler*, 3 Mas. 242.

A bank which receives notes for collection is liable for the acts or omissions of its agents, or of other banks to whom the

notes may be transmitted by it for collection. *Montgomery County Bank v. Albany City Bank*, 7 N. Y. (3 Seld.) 459; *Ayrault v. Pacific Bank*, 47 N. Y. (2 Sick.) 570; 7 Am. Rep. 489; see *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Eq. Cas. 226. A bailee who undertakes to keep money safely, is liable for the acts or neglects of his servants, in respect to such deposits. *Clark v. Bank of Wheeling*, 17 Penn. St. 322; *Taber v. Parrott*, 2 Gall. 565; *Ray v. Bank*, 10 Bush (Ky.), 344.

A mercantile agency, or an attorney, who receives accounts, bills, notes, or demands for collection, will be responsible to the depositor, for any acts, frauds, omissions, or negligences of any person or agent to whom such bills, notes, etc., may be sent, or with whom they may be left for collection, by the party employed by such depositor. *Bradstreet v. Everson*, 72 Penn. St. 124; *Lewis v. Peck*, 10 Ala. 142; *Pollard v. Rowland*, 2 Blackf. 22; *Cummins v. M'Lain*, 2 Pike (Ark.), 402; *Wilkinson v. Griswold*, 12 Sm. & Marsh. 669; *ante*, 249, art. 6, § 1.

§ 3. **Agent when not liable for torts.** An agent who is engaged in the performance of lawful acts, and who does not exceed the authority conferred upon him, will not, as a general rule, be personally liable to third persons for his acts, or neglects. *Ante*, 263, § 1. So it has been seen, *ante*, 256, that he is not liable upon his contracts, unless he assumes a personal liability.

§ 4. **Principal not liable for agent's willful torts.** Although a principal is liable for the negligence of his agent, when acting within the scope of his authority, *ante*, 263, and in some cases for his willful or malicious acts, *ante*, 265, § 2; yet the general rule is, that a principal is not responsible for the acts of an agent who exceeds his authority, and willfully does an injury to the person or property of another. *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. (2 Comst.) 497; *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y. (2 Sick.) 122; 7 Am. Rep. 418.

But, if a principal ratifies, or takes advantage of his agent's tortious acts, he will be liable, whether such torts be willful or fraudulent. *Durst v. Burton*, 47 N. Y. (2 Sick.) 167; 7 Am. Rep. 428; *Woodward v. Webb*, 65 Penn. St. 254; *Priester v. Augley*, 5 Rich. 14; *Exum v. Bristor*, 35 Miss. 391; *Wallace v. Morgan*, 23 Ind. 399.

A principal cannot enforce a contract which his agent has fraudulently obtained, even though he neither authorized nor had notice of the fraud prior to the execution and delivery of the contract. *Cassard v. Hinman*, 8 Bosw. 8; *Concord Bank v.*

Gregg, 14 N. H. 331; *Robinson v. Bealle*, 20 Ga. 275; *Wright v. Calhoun*, 19 Tex. 412.

§ 5. **Liability of public agents for torts.** It is a general rule, that the government is not responsible for the misfeasances, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service. And this rule of exemption from liability extends so far that public officers and agents are not liable for the misfeasances or positive wrongs, or the nonfeasances or negligences, of the sub-agents, or servants, or other persons properly employed by and under them, in the discharge of their official duties. The postmaster-general is not liable for any default, negligence, or misfeasance of any of the deputies or clerks employed under him in his office. *Lane v. Cotton*, 1 Ld. Raym. 646; 12 Mod. 482.

A contractor for the transportation of the public mail is not liable for money inclosed in a way-letter, and lost by the neglect of the mail carrier employed by him on the route. *Hutchins v. Brackett*, 22 N. H. 252; *Conwell v. Voorhees*, 13 Ohio, 523. The mail carrier is not an officer of the government, but the private agent of the contractor, who is liable to third persons for injuries sustained by them through the negligence or default of such agent in the performance of his duties. *Sawyer v. Corse*, 17 Gratt. 230.

An action will not lie against a postmaster for the purloining of a letter by his sworn assistants, who was appointed and retained in good faith. *Schroyer v. Lynch*, 8 Watts, 453; *Wiggins v. Hathaway*, 6 Barb. 632. But see *Coleman v. Frazier*, 4 Rich. 146.

But he will be liable for the acts of one whom he permits to have the care and custody of the mail, in his office, where such person has not been sworn according to law. *Bishop v. Williamson*, 11 Me. 495; *Christy v. Smith*, 23 Vt. 663. And it has been held that an assistant postmaster is not an officer of the government, but a mere servant or agent of the postmaster, who is liable in a civil action for the negligence of the assistant, by means of which a letter containing money is stolen from the office. *Coleman v. Frazier*, 4 Rich. 146; and see *Bolan v. Williamson*, 1 Brev. 181; 2 Bay, 551; *Christy v. Smith*, 23 Vt. 663.

ARTICLE XI.

OF THE RIGHTS OF AGENTS IN REGARD TO THEIR PRINCIPALS.

Section 1. In general. The general duties of an agent, and his obligations to his principal, as well as his liabilities to third persons, having been sufficiently noticed, it remains to consider some of the rights of an agent in regard to his principal. These subjects will be separately considered in the several following sections.

§ 2. Compensation of agent. A duly authorized agent, who renders services for his principal in accordance with the employment he undertakes, is, as a general rule, entitled to a reasonable compensation, if there is no express agreement upon that subject. *Mangum v. Ball*, 43 Miss. 288.

An agreement to pay an agent for his services a certain amount "in equal quarterly payments" is a contract for a year, and an action lies for the stipulated salary if the agent is dismissed without cause before the expiration of the year. *Kirk v. Hartman*, 63 Penn. St. 97.

Where an agent is employed under a contract for a specified time, at an agreed salary, and he continues in such employment after the expiration of the agreed time, he will be entitled to the same rate of compensation for the additional time. *Vail v. Jersey Little Falls Manuf. Co.*, 32 Barb. 564. A continuance in the employment of the hirer, with his consent, after the completion of the first contract, is equivalent to a new hiring upon the same terms. *Ib.* If a hirer does not carry on his business for a part of the time, and thus has nothing for the agent to do during that period, this will not affect the construction of the contract, or the liabilities of the parties. *Ib.*

The compensation of an agent may be by salary, or by commissions. Where the compensation is to be by salary, the contract is one for a specified period of time for a definite sum; where compensation is by commissions, the payment depends upon the performance of specified conditions or transactions.

An agent employed at a specific salary is entitled to payment at the agreed sum, even though the employer does not furnish full employment. *Vail v. Jersey Little Falls Manuf. Co.*, 32 Barb. 564.

So where an employer agrees to furnish employment to another for a certain time, at a specified compensation, and he discharges

him without cause, before the expiration of the time, he is in general bound to pay the full amount of wages for the whole time. *Costigan v. Mohawk & Hudson R. R. Co.*, 2 Denio, 409; *Colburn v. Woodworth*, 31 Barb. 381; *Decker v. Hassel*, 26 How. 528.

If a principal, who has an agent in his employ, at a fixed salary, confers upon him additional powers which involve greater duties, with no stipulation for additional compensation, the agent cannot recover extra wages for such additional service. *Moreau v. Dumagene*, 20 La. Ann. 230; *Marshall v. Parsons*, 9 C. & P. 656; *Gratiot v. United States*, 4 How. (U. S.) 80; *United States v. Buchanan*, 8 id. 83; *United States v. Brown*, 9 id. 487, 500.

How far custom will change the rule may not be entirely settled. See *United States v. McDonald*, 7 Peters, 1; *United States v. Fillebrown*, id. 28.

Where there is an express agreement as to the amount of compensation or salary to be paid by the principal to the agent, that will control, and the contract cannot be varied by custom or usage of trade, or by any implied agreement, *ante*, 127; *Bower v. Jones*, 8 Bing. 65.

In the absence of an express agreement, the agent may recover the usual or fair and just compensation which the law gives in such cases. *Mangum v. Ball*, 43 Miss. 288.

If services are rendered gratuitously, as by a friend, neighbor, or relative, without any stipulation as to compensation, and without intending to make any charge for them, a claim cannot afterward be enforced by action for such services. *Hill v. Williams*, 6 Jones' Eq. (N. C.) 242; *Bartholomew v. Jackson*, 20 Johns. 28; *Ehle v. Judson*, 24 Wend. 98.

Services are sometimes rendered upon a mutual understanding that they are to be compensated by a provision in the will of the party for whom they are performed; and, in such a case, if no provision is made by will, an action will lie to recover the value of such services. *Robinson v. Raynor*, 28 N. Y. (1 Tiff.) 494; *Quackenbush v. Ehle*, 5 Barb. 469; *Martin v. Wright's Admrs.*, 13 Wend. 480; *Bayliss v. Pritchard*, 24 Wis. 651; *Jilson v. Gilbert*, 26 id. 337; 7 Am. Rep. 100.

A very common mode of making compensation for an agent's services is by commissions. There may be an express agreement as to their amount, which is usually a percentage upon the value or amount of business done, such, for instance, as the value of

the goods bought or sold within a specified time, or during the course of the agency. *Marshall v. Parsons*, 9 C. & P. 656; *Bower v. Jones*, 8 Bing. 65; *Stewart v. Mather*, 32 Wis. 344; *Barnstein v. Lans*, 104 Mass. 214.

In the absence of an express agreement as to the rate or amount of the commissions, it may be established by the custom or usage of the trade, at the place, or in the business, where the agent is employed. *Eicke v. Meyer*, 3 Camp. 412; *Cohen v. Payet*, 4 Camp. 96; *Roberts v. Jackson*, 2 Stark. (N. P.) 225; *Reed v. Rann*, 10 B. & C. 438.

If there be no express agreement, and no controlling custom, then the value of the services will be assessed upon the principle of paying what they are fairly worth under the circumstances of the particular case. *Mangum v. Ball*, 43 Miss. 288; *Briggs v. Boyd*, 56 N. Y. (11 Sick.) 289, 295.

§ 3. *Service before payment.* Where the compensation is to be paid by way of commissions, the general rule is, that the whole service or duty must be performed, before any right to commissions arises. *McGarock v. Woodlief*, 20 How. (U. S.) 221; *Walker v. Tirrell*, 101 Mass. 257; 3 Am. Rep. 352; *Earp v. Cummins*, 54 Penn. St. 394; *Satterthwaite v. Vreeland*, 3 Hun, 152; 5 N. Y. S. C. (T. & C.) 363; 48 How. 508.

An agent may, under some circumstances, recover pay for what he has done, even though the service undertaken has not been completed, if the act of the principal has prevented the performance of it. *Briggs v. Boyd*, 56 N. Y. (11 Sick.) 289, 294; *Durkee v. Vermont Central Railway Co.*, 27 Vt. 127; *Gillespie v. Wilder*, 99 Mass. 170.

An agent or broker who undertakes to sell property for another for a certain commission has earned, and may recover, his commission, when he finds a purchaser willing to purchase at the price fixed, even though the sale was never completed, where the failure to complete it was in consequence of a defect of title, or other cause produced by the act, omission or fault of the vendor, without any fault on the part of the agent or broker. *Doty v. Miller*, 43 Barb. 529; *Keys v. Johnson*, 68 Penn. St. 42; *Glentworth v. Luther*, 21 Barb. 145; *Simonson v. Kissick*, 4 Daly, 143; *Tyler v. Parr*, 52 Mo. 249; *Jones v. Adler*, 34 Md. 440; *Phelan v. Gardner*, 43 Cal. 306; *Lincoln v. McClatchie*, 36 Conn. 136.

And if the principal makes a sale of the property to a person who was induced to make the purchase by the acts of the agent,

he will be entitled to his commission, as the principal will not be permitted to evade the payment of what is justly due for services fully and fairly performed by the agent so far as he was permitted by the principal. *Ib.*

§ 4. **Faithful discharge of duty before payment.** An agent is not only bound to perform his contract according to its terms, but he must also conduct himself with entire good faith toward his principal.

And, if he is employed in the performance of a particular business transaction, in which he is guilty of bad faith toward his principal, he will forfeit his commissions. *Sumner v. Reickniker*, 9 Kansas, 320; *Porter v. Selvers*, 35 Ind. 295; *Vennum v. Gregory*, 21 Iowa, 826; *Segar v. Parrish*, 20 Gratt. 672; *Everheart v. Searle*, 71 Penn. St. 256.

And, where the conduct of the agent is not such as to deprive him entirely of compensation, his conduct will be carefully scrutinized by the courts, which will fully protect the principal's interests and rights. *Gallup v. Merrill*, 40 Vt. 133; *Sampson v. Somerset Iron Works*, 6 Gray, 120; *Jones v. Hoyt*, 25 Conn. 574; *Woodward v. Shydam*, 11 Ohio, 362.

§ 5. **Adverse interests, or acting for two parties.** It has been seen, *ante*, 245, that an agent is not permitted to act in a manner which is adverse to the interests of his principal.

And, if he agrees separately with each of the parties for a compensation from each, without the knowledge of his principal, he will not be permitted to recover any compensation from either of them. *Everheart v. Searle*, 71 Penn. St. 256; *Place v. Greenman*, 6 N. Y. S. C. (T. & C.) 681; 4 Hun, 660; but see *Rupp v. Sampson*, 16 Gray, 398; cited, *ante*, 248, § 12, with other cases, in which it is held that one who acts as a mere middleman, and not as an agent, may recover such compensation as is promised to him. If an agent acts for both parties in making a contract, the contract is not void, but voidable, and if the principal would repudiate it, he must do so within a reasonable time. *Greenwood v. Spring*, 54 Barb. 375.

§ 6. **Reimbursement and indemnity of agents.** An agent is entitled to claim from his principal a reimbursement for all advances, expenses, and disbursements made by him in the course of his agency, for the benefit, or on account of his principal, if such advances or expenses are reasonable and just. *Ramsay v. Gardner*, 11 Johns. 439; *Colley v. Merrill*, 6 Greenl. 50; *Giddings v. Sears*, 103 Mass. 311; *Wynkoop v. Seal*, 64 Penn. St.

361; *Mears v. Adreon*, 31 Md. 229; *McCroskey v. Mabey*, 45 Ga. 327.

So where an agent who is acting in good faith, and without fault, in the proper service of his principal, is subjected to expense, or is sued on a contract made by him, or for an act done pursuant to his authority, the principal is bound by law to indemnify and reimburse him for the expense. *Powell v. Trustees of Newburg*, 19 Johns. 284; *Howe v. Buffalo, N. Y. & Erie R. R. Co.*, 37 N. Y. (10 Tiff.) 297; 4 Trans. App. 249; *Turner v. Jones*, 1 Lans. 147; *Storking v. Sage*, 1 Conn. 519; *Delaware Ins. Co. v. Delaunie*, 3 Binn. 295.

But, if an agent needlessly, officiously, and without authority, makes advances, or incurs expenses, he will not be entitled to reimbursement. *Pickering v. Demerritt*, 100 Mass. 416; *Day v. Holmes*, 103 id. 306; *Howard v. Tucker*, 1 B. & Ad. 772.

§ 7. **Loss or damage sustained for principal.** Where damages are incurred, or losses are sustained by an agent, without his fault, in the management or transaction of his principal's business, or in following his instructions, the principal must sustain the loss or damage, and indemnify the agent if he has been compelled to pay them. *D'Arcy v. Lyle*, 5 Binn. 441-455; 1 Am. Lead. Cas. 856, (711); *ante*, 241, 244, § 6. If an agent, in consequence of a deception practiced on him by his principal, innocently incurs a risk or responsibility, and is compelled to pay damages to a purchaser in consequence, he will be entitled to reimbursement from his principal. *Yeatman v. Corder*, 38 Mo. 337. So an agent may recover from his principal damages sustained in defending a suit on the principal's behalf, if the agent was acting within the scope of his authority, and the loss arose from the fact of the agency, and without any fault or laches on his part. *Frixione v. Tagliaferro*, 34 Eng. Law & Eq. 27; 10 E. F. Moore (P. C.), 175. And it is not material that the agent exceeded his instructions, if the excess was expressly waived by the principal. *Ib.*

If an agent commits a trespass or does any other wrong to the property of a third person, by the direction of his principal, without any knowledge or suspicion at the time, that the act is a trespass or wrong, but he acts in good faith in the matter, he will be entitled to a reimbursement from his principal of all the damages he has sustained in consequence of such acts. *Adamson v. Jarvis*, 4 Bing. 66; *Powell v. Trustees of Newburg*, 19 Johns. 284; *Coventry v. Barton*, 17 id. 142; *Avery v. Halsey*, 14 Pick. 174; *Gower v. Emery*, 18 Me. 79.

Any loss growing out of the use of the principal's fund, in pursuance of his directions, will fall on the principal and not upon the agent. *Hamilton v. Cook County*, 4 Scam. (Ill.) 519.

To entitle an agent to claim a remuneration from his principal, for a loss sustained by the agent, he must have been acting strictly in the place of the principal, in accordance with his will, and the business must be that of the principal, and not that of the agent. *Corbin v. American Mills*, 27 Conn. 274; *Saveland v. Green*, 36 Wis. 612.

§ 8. **Illegal acts.** Where the instructions or orders of a principal are illegal, and are known by the agent to be such, he cannot maintain an action against the principal for indemnity as to such acts as are done under such orders or instructions. *Trustees of Newburg v. Galatian*, 4 Cow. 340; *St. John v. St. John's Church*, 15 Barb. 346; see, also, *Illegality*; *Indemnity*.

§ 9. **Power of agent to pledge goods.** At common law, and independently of a statutory authority to the contrary, an agent has no authority to pledge or to sell his principal's property for the debts of such agent. *Bonito v. Mosquera*, 2 Bosw. 401; *Van Amringe v. Peabody*, 1 Mason, 440; *Warner v. Martin*, 11 How. (U. S.) 209, 224; *Parsons v. Webb*, 8 Greenl. 38; *Morris v. Watson*, 15 Minn. 212; *Foss v. Robertson*, 46 Ala. 483; see further, *Lausatt v. Lippincott*, 6 Serg. & R. 386; 1 Am. Lead. Cas. 805-821. The powers of factors in relation to the sale or pledging of goods belonging to their principals is regulated by statute in many of the States. See *Factor*; *Pledge*.

ARTICLE XII.

OF THE LIEN OF AGENTS.

Section 1. Of an agent's lien in general. An agent's lien is the right to detain in his possession the property of another until his claims upon it are satisfied. Liens may be created by express contract. *McCaffrey v. Wooden*, 62 Barb. 316; *Milliman v. Neher*, 20 id. 37, 40, but they generally arise by operation of law. *Chambers v. Davidson*, L. R., 1 P. C. 296; 4 Moore's P. C. (N. S.) 158; *Kirchner v. Venus*, 12 Moore's P. C. 158. In this particular the rules of equity are the same as those of the common law. *Oxenham v. Esdaile*, 2 Younge & Jarv. 493; 3 id. 262; 3 B. & C. 225.

§ 2. **Particular liens.** Liens may be general or particular. A lien is particular when it is confined to work done on a particu-

lar article, by the workman, or for some expense incurred or bestowed upon it.

The general rule is, that any person who is employed to put his labor or money into a thing on his employer's account, has a right to detain such thing until he is paid for the outlay or services. *Wilson v. Martin*, 40 N. H. 88, 91; *Morgan v. Congdon*, 4 Comst. 552; *United States Exp. Co. v. Haines*, 67 Ill. 139; *Nevan v. Roup*, 8 Iowa, 207; *Farrington v. Meek*, 30 Miss. 578.

§ 3. **General liens.** A general lien is one which covers the indebtedness of the principal to the agent on a balance due upon the accounts of the parties. It is a right to retain a thing not merely for the charges or claims arising out of, or connected with, that particular thing, but also for a general balance of accounts between the parties, in respect to other dealings of a like nature. *Myer v. Jacobs*, 1 Daly, 32.

A general lien is not allowed for any items of account or debts except such as are incurred upon the general account, and does not include items wholly disconnected with the business of the agency. *McKenzie v. Nevins*, 22 Me. 138; *Jarvis v. Rogers*, 15 Mass. 389.

The law does not favor general liens; and, it is said, that a general lien cannot be claimed according to any general law of principal and agent, but only as arising from dealings in some particular trade, as to which a custom to that effect has been established. *Bock v. Garrissen*, 2 De Gex, Fish. & Jones, 434, 443; Story on Agency, §§ 354, 355. See *Winter v. Coit*, 7 N. Y. (3 Seld.) 288. The instances in which general liens are allowed usually relate to transactions with factors, insurance brokers, bankers, common carriers, attorneys, and some others. The right of lien in such cases will be considered when treating of those titles, and under the general title Lien.

§ 4. **Lien, how acquired.** As a general rule no valid lien can be created except by the act or consent of the owner of the property, or by some one who has a right or authority to do so.

And, therefore, one who is not the owner of property, or who has no rightful power to dispose of, or to create a lien upon it, or, if he exceeds his authority, or is a mere wrong-doer, or his possession is tortious, he cannot, ordinarily, create a lien, or confer it upon others.

A different rule would enable a party to give to others a right or title which he himself did not possess, in violation of the maxim, that no one can transfer to another any greater right

than he himself has. *Broom's Leg. Max.* 467, 469; *Hoffman v. Carow*, 22 Wend. 285, 294; *Barnard v. Campbell*, 55 N. Y. (10 Sick.) 456, 462. An agent or factor cannot pledge his principal's goods to secure his own debt.

And, where goods come into an agent's hands, without the owner's consent, the agent cannot detain them until his charges and expenses are paid. *Travis v. Thompson*, 37 Barb. 236; *Robinson v. Baker*, 5 Cush. (Mass.) 187; *Clark v. Lowell and Lawrence R. R. Co.*, 9 Gray, 231.

To constitute a valid lien there must be an actual or a constructive possession of the property or thing by the party who claims it, with the express or implied assent of the party against whom it is claimed. *Winter v. Coit*, 7 N. Y. (3 Seld.) 288; *Hall v. Jackson*, 20 Pick. 194, 197; *Holbrook v. Wright*, 24 Wend. 169; *Kollock v. Jackson*, 5 Ga. 153, 155; *Elliot v. Cox*, 48 id. 39. A constructive possession may be as valid as an actual possession, as where the property or thing is in the possession of his servant or agent, or where the lien is created by a bill of lading, or by a bill of sale, or by some other similar act or instrument. *Ib.* Where property is lost or stolen, and the owner offers a specified sum as a reward to any person finding or restoring it, the person who finds or restores it, has a lien upon it until the reward is paid. *Cummings v. Gann*, 52 Penn. St. 484; *Wentworth v. Day*, 3 Metc. (Mass.) 352. But where the offer is merely to pay "a liberal reward," there is no lien. *Wilson v. Guyton*, 8 Gill. 213.

§ 5. Upon what demands a lien may be had. It may be said generally that liens do not attach to any but certain and liquidated demands; and that where they sound only in damages and can only be ascertained through the intervention of a jury, no lien attaches. Story on Agency, § 364; *Wilson v. Guyton*, 8 Gill. 213. But a lien may be given in such a case by virtue of a special agreement to that effect. *Drinkwater v. Goodwin*, Cowp. 251.

An agent who is not employed for a continuous service, but merely to do something to a particular thing, will not have a lien upon such thing for any services except such as are bestowed upon or connected with it. *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Thacher v. Hannahs*, 4 Rob. 407; *Castellain v. Thompson*, 13 C. B. (N. S.) 105; *Adams v. Clark*, 9 Cush. 215; *Scott v. Jester*, 8 Eng. (Ark.) 437; *Somes v. British Empire Shipping Co.*, 8 H. L. Cas. 338; S. C., E. B. & E. 353.

No lien can be enforced for the security or payment of an illegal demand. See *Illegality*.

§ 6. **Waiver of lien, or of right to it.** The nature of the contract may be such that no right of lien attaches, as where services are rendered or money advanced upon property on an express agreement that the services and advances are made upon the personal credit of the owner of the property, or where a credit is given for a specified time. *Stoddard Woolen Manuf. v. Huntley*, 8 N. H. 441; *Chandler v. Belden*, 18 Johns. 157; *Trust v. Pirsson*, 1 Hilt. 293; *Cummings v. Harris*, 3 Vt. 244.

An existing lien may be waived by an express agreement to accept other securities in the place of such lien, whether such securities be upon other property or upon the personal responsibility of another person. *Bailey v. Adams*, 14 Wend. 201; *Murphy v. Lippe*, 3 Jones & Sp. 542; *Foltz v. Peters*, 16 Ind. 244; *Hutchinson v. Olcott*, 4 Vt. 549.

A person who has a lien upon goods will waive it by voluntarily surrendering them to the owner; for, since the right is founded upon possession, a surrender of that possession to the owner will terminate the right. *Brackett v. Hayden*, 15 Me. 347; *Sears v. Wills*, 4 Allen, 212; *Bigelow v. Heaton*, 4 Denio, 496; *Sawyer v. Lorillard*, 48 Ala. 332; *Bailey v. Quint*, 22 Vt. 474.

The goods may, however, be transferred upon an express agreement that the lien shall be retained, as where he delivers them to a third person as a security, with a notice of his lien, and who is to hold and possess them as his agent for the purpose of preserving the lien. *Urquhart v. McIver*, 4 Johns. 103; *Clemson v. Davidson*, 5 Binn. 392; *Donald v. Suckling*, L. R., 1 Q. B. 585; *Nash v. Mosher*, 19 Wend. 431.

The possession of the factor's or the agent's carrier or agent is the possession of such factor or agent. *Holbrook v. Wight*, 24 Wend. 169, 175.

And for the purposes of a lien, a constructive is as effectual and valid as an actual possession. *Kallock v. Jackson*, 5 Ga. 153, 155.

The indorsement and delivery of a bill of lading is a sufficient possession of the property mentioned or described in it. *First National Bank of Cincinnati v. Kelly*, 57 N. Y. (12 Sick.) 34; *Rice v. Austin*, 17 Mass. 197.

Although a return of the possession of goods to the owner by one who has a lien upon them is a waiver of the lien, yet, if the

owner restores them to the party so having the previous lien, the lien will be revived or restored. *Moody v. Webster*, 3 Pick. 424, 426; *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268. But see *Grinnell v. Cook*, 3 Hill, 485, 492.

In such case the goods would be subject to any other lien or incumbrance which may have attached while they were in the owner's possession and before their return to the party having the prior lien. *Ib.* *Perkins v. Boardman*, 14 Gray, 481.

Where a lien is lost or destroyed, it is the same as though it had never existed. *Ib.* *Pharis v. Leachman*, 20 Ala. 662.

§ 7. **Enforcing Lien.** Generally, a lien is nothing more than a right of retaining the possession of the property subject to the lien; and the party entitled to such lien cannot sell or dispose of the property for the purpose of satisfying his lien, without the express or implied consent of the owner. *Briggs v. Boston & Lowell R. R. Co.*, 6 Allen, 247; *Fox v. McGregor*, 11 Barb. 41.

The remedy in such cases is by a foreclosure of the lien in a court having proper authority for that purpose. *Ib.* See Laws of N. Y., 1869, ch. 738, providing for the enforcement of liens.

Property pledged may be sold by the pledgee, after personal notice to the pledgor; and if such notice cannot be given, the remedy is in equity. *Stearns v. Marsh*, 4 Denio, 227; *Bryan v. Baldwin*, 52 N. Y. (7 Sick.) 232; *Porter v. Parks*, 49 N. Y. (4 Sick.) 564; *Sitgreaves v. Farmers & Mechanics' Bank*, 49 Penn. St. 359.

Factors generally have a right to sell the property in their hands for the purpose of reimbursing themselves for advances, expenses, and the like proper charges. See Factors; Lien.

The lien of a mechanic is a mere right of retainer, personal to the party in whom it exists, and it is not assignable nor attachable as personal property, or as a chose in action, of the person entitled to it. *Lovett v. Brown*, 40 N. H. 511; *Holly v. Huggeford*, 8 Pick. 73, 76; *Daubighny v. Duval*, 5 T. R. 606.

§ 8. **Lien of sub-agent.** A sub-agent, who is a mere servant of the primary agent, bears no personal relation to the principal, and has no lien against him. Story on Agency, § 388; Whart. on Agency, § 827.

ARTICLE XIII.

RIGHTS OF AGENTS AS TO THIRD PERSONS.

Section 1. Rights in general. The rights of agents in relation to third persons are generally such as arise out of contracts made by the agent with them, or out of torts committed by such persons against the rights or property of the agent while acting in that capacity. The right of action may sometimes be vested in the agent, sometimes in the principal, and in some cases, either of them may sue. As the agent, as a general rule, merely represents his principal, so the rights accruing from the business of the agency are generally enforced by the principal. Where an agent, in the sale of his principal's property, binds himself personally, he does not acquire any greater rights against the purchaser than he would if contracting for the sale of his own property. *Everit v. Bancroft*, 22 Ohio St. 172.

§ 2. **Right of agent to sue in his own name.** Agents who openly act as such, and who name their principals, do not usually incur any personal liability, *ante*, 256, and, therefore, cannot be sued upon such contracts. So, on the other hand, in such cases the right of action upon the contracts is vested in the principal, and not in the agent. Familiar instances are numerous enough, as in the case of a clerk who sells goods in a store or shop, or any other similar case, in which the right of action for the price of the goods is in the principal and not in the clerk. And, on the other hand, any right of action by the purchaser in relation to the title or quality of the goods sold, or any other right of action growing out of such contract of sale, must be enforced against the principal, and cannot be enforced against the clerk or agent.

These, however, are general rules, and they do not govern every case of contracts made by agents. It has been seen, *ante*, 256, that agents may be liable to be sued upon contracts made by them; and we shall see that there are also instances in which the agent may sue in his own name upon contracts made by him as agent.

The cases in which agents may sue upon contracts made by them are usually classified in the following manner: First, where the contract is a written one, and is made expressly with the agent, and purports to be a contract personally with him, although it may be known by the other party that he is acting as a mere agent; Secondly, where the agent is the only known

or ostensible principal, and, therefore, is, in legal effect the real contracting party; Thirdly, where by the usage of trade, or the general course of business, the agent is authorized to act as the owner, or as a principal contracting party, although his character as agent is known; Fourthly, where the agent has made a contract, in the subject-matter of which he has a special interest or property, whether he professed at the time to be acting as agent for himself, or not. Story on Agency, § 393. In such cases the agent acquires personal rights which he may enforce by an action in his own name, without regard to the question whether his principal has not similar rights upon the same contracts. In the first class of cases an illustration is found in those instances in which a promissory note, or other commercial paper, is made payable to an agent in his own name.

Upon such a note the agent may maintain an action in his own name, although at the time it was given, he was known, by the party giving it, to be acting as the agent of another person. *Fish v. Jacobsohn*, 2 Abb. Ct. App. 132; 1 Keyes, 539; *Considerant v. Brisbane*, 22 N. Y. (8 Smith) 389, 393; *Buffum v. Chadwick*, 8 Mass. 103; *Johnson v. Catlin*, 27 Vt. 89; *McConnell v. Thomas*, 2 Scam. (Ill.) 309, 313; *Moore v. Penn*, 5 Ala. 135; *Jackson v. Heath*, 1 Bailey, 355.

The agent's right to sue in his own name, where the instrument is in terms payable to him, is the same whether it be a promissory note, bill of exchange, check, bill of lading, policy of insurance, bond, and the like instances. *Ib.* *Van Staphorst v. Pearce*, 4 Mass. 258; *Sargent v. Morris*, 3 B. & Ald. 279, 280; *Blanchard v. Page*, 8 Gray, 281; *Griffith v. Ingledew*, 6 Serg. & R. 429; *Offley v. Warde*, 1 Lev. 235.

If negotiable paper is indorsed in blank, and then placed in the hands of an agent for collection, he may sue upon it in his own name. *Brigham v. Marean*, 7 Pick. 40; *Gurnsey v. Burns*, 25 Wend. 411; *Phelan v. Moss*, 67 Penn. St. 59; S. C., 5 Am. Rep. 402; *Hamilton v. Vought*, 34 N. J. 187; *United States v. Dugan*, 3 Wheat. 172, 180.

Where it is doubtful, upon the face of the instrument, whether the parties to it intended that the right of action upon it should be in the principal or in the agent, it is quite generally held that either of them may sue upon it. *Dupont v. Mount Pleasant Ferry Co.*, 9 Rich. 255, 259; *Rutland & Burlington R. R. Co. v. Cole*, 24 Vt. 33; *Griffith v. Ingledew*, 6 Serg. & R. 429; *Herndon*

v. *Taylor*, 6 Ala. 461; Story on Agency, § 395; Whart. on Agency, § 439.

The true rule is, for the court to examine the whole instrument, and from that to determine what was the actual intention of the parties, as to the party who was to have the right to enforce it. When the instrument is in writing the construction is for the court, and upon the entire instrument, *ante*, 122; see 1 Am. Lead. Cas. 773-778 (641-646).

In the second class of cases, in which the agent acts in his own name without disclosing any other principal, it is clear that the opposite contracting party is personally bound to the agent, and that the latter may enforce the contract. *Bickerton v. Burrell*, 5 Maule & Selw. 383; *Raynor v. Grote*, 15 M. & W. 359; Dicey on Parties, 144, 184. One who contracts in reality for himself, but apparently as agent for another person, whose name he gives, cannot sue on the contract as principal. *Ib.* *Boulton v. Jones*, 2 H. & N. 564; *Schmaltz v. Avery*, 16 Q. B. 655.

In the third class of cases, where by the usage of trade, or the general course of business, the agent, though known to be acting as such, is dealt with, as if he were the principal, so that the contract is a personal contract with him, it is not material whether the contract is considered as one exclusively made with the agent, or whether the real principal, as an implied party, has a right to enforce, or to avail himself of the contract.

In the fourth class of cases, in which the agent has an interest or property, he may sue in his own name for the enforcement of the contract. *Sargent v. Morris*, 3 B. & Ald. 276, 280, 281; *Leeds v. Marine Ins. Co.*, 6 Wheat. 565; *Kent v. Bornstein*, 12 Allen, 342; *Eerit v. Bancroft*, 22 Ohio St. 172; *Whitehead v. Potter*, 4 Ired. 257.

Factors may enforce their liens by a sale of the property in their possession. See Factors; Liens.

§ 3. **Principal may control actions.** Although agents may, in many instances, bring actions in their own names upon contracts made by them, this does not give them an unlimited right as to the management or control of the action.

The right of the agent to bring actions is always a subordinate one which may be directed and controlled by the principal.

And whenever a principal intervenes by bringing an action in his own name, the powers of the agent are superseded so far as such action will produce that result. *Taintor v. Prendergrast*, 3 Hill, 72; *Girard v. Taggart*, 6 Serg. & R. 27; *Sargent v. Morris*,

3 B. & Ald. 277; *Sadler v. Leigh*, 4 Camp. 195; *Morris v. Cleasby*, 1 Maule & Selw. 576; *Walker v. Russ*, 2 Wash. C. C. 283; *Hicks v. Whitmore*, 12 Wend. 548.

This intervention by the principal will not be permitted to operate in such a manner as to affect or deprive the agent of any right or interest he may have in the contract, whether by way of lien, or otherwise. *Drinkwater v. Goodwin*, Cowp. 251, 255; *Morris v. Cleasby*, 1 Maule & Selw. 576; *Hudson v. Granger*, 5 B. & Ald. 27, 32-34; *Houghton v. Mathews*, 3 Bos. & Pul. 489. Where an action is brought upon a contract, in the name of the agent, the same defenses may be interposed that would be available if the action were brought by the principal. *Taintor v. Prendergrast*, 3 Hill, 72; *Huntington v. Knox*, 7 Cush. 371; *Leeds v. Marine Ins. Co.*, 6 Wheat. 565; *Coppin v. Walker*, 7 Taunt. 237.

In such an action the defendant may show as a defense that he did not make any contract with the agent as an agent, but contracted with him upon the supposition, and in the belief that he was the principal. *Winchester v. Howard*, 97 Mass. 333; *Humble v. Hunter*, 12 Q. B. 311.

And, if a principal sues upon a contract made by his agent, the same defenses may be made that would be available if the action were brought by the agent in his own name. *Ib.* *Leeds v. Marine Ins. Co.*, 6 Wheat. 565; *Hogan v. Shorb*, 24 Wend. 458; *George v. Clagett*, 7 T. R. 359; S. C., 2 Smith's Lead. Cas. 125 (185).

§ 4. **Agent may sue for tort of third person.** An agent who is in possession of property belonging to his principal, where such possession was acquired in the course of the agency, has such an interest therein that he may maintain an action of trespass or of trover against a third person who unlawfully takes or converts such property. *Bass v. Peirce*, 16 Barb. 595; *Faulkner v. Brown*, 13 Wend. 63; *Gorum v. Carly*, 1 Abb. 285.

The principal may maintain the action in his own name, at his election. See the next article, § 5.

ARTICLE XIV.

RIGHTS OF PRINCIPALS AGAINST THIRD PERSONS.

Section 1. In general. The rights which arise or are acquired by a principal, against third persons, under or by virtue of an

agency created by him, are those founded upon contracts made by the agent, or on account of torts committed upon or against property during the course of such agency.

§ 2. **Rights of principal on agent's contracts.** It is very clear that a principal is bound by the acts or contracts of his agent, when done with his consent, by his authority, or when adopted by his ratification, *ante*, 221, 232. And, on the other hand there is a reciprocal obligation or liability to the principal, on the part of the third person, with whom such contracts are made, and for whose benefit, and with whose consent, such acts are done. Story on Agency, § 418.

When an agent makes a contract in the name of his principal, and not in his own name, the principal is the real contracting party, and may enforce the contract in the same manner as though made by himself in person. *Taintor v. Prendergrast*, 3 Hill, 72; *Bassett v. Lederer*, 1 Hun, 274; 3 N. Y. S. C. (T. & C.) 671; *Ilsley v. Merriam*, 7 Cush. 242; *Barry v. Page*, 10 Gray, 398; *Brewster v. Saul*, 8 La. 296; *Small v. Atwood*, 1 Younge, 407, 452.

The rule is the same although the name of the principal be not disclosed. *Ib.* *Graham v. Duckwall*, 8 Bush (Ky.), 12; *Foster v. Smith*, 2 Coldw. (Tenn.) 744; *Woodruff v. McGehee*, 30 Ga. 158; *Culver v. Bigelow*, 43 Vt. 249. But, while the principal is entitled to the advantages or benefits to be derived from the contracts made on his behalf by his agent, he also takes all the burthens or disadvantages connected with the contract. And, if the contract of the agent was obtained by his fraud, misrepresentation, or warranty, the principal will be affected by the consequences, and the other party may interpose any defense that would be available if the principal had done precisely what was done by his agent. *Elwell v. Chamberlain*, 31 N. Y. (4 Tiff.) 611; *Veazie v. Williams*, 8 How. (U. S.) 134, 157.

If the name of the principal is not disclosed, and the agent enters into the contract as though made for himself, the principal, if he assumes the right to enforce the contract, must take it subject to all the equities which could be enforced against the agent. *Taintor v. Prendergrast*, 3 Hill, 72; *Leeds v. Marine Ins. Co.*, 6 Wheat. 565; *Gibson v. Winter*, 5 B. & Ad. 96; *Traub v. Millikin*, 57 Me. 63; 2 Am. Rep. 14; *George v. Clagett*, 7 Term Rep. 359.

§ 3. **Payments to agents.** Payment of money due to the principal, when made to an agent duly authorized to receive it, is a

good payment to the principal, and a discharge of the debtor. *Favenc v. Bennett*, 11 East, 38; *Baring v. Corrie*, 2 B. & Ald. 137; *Renard v. Turner*, 42 Ala. 117.

But there are cases in which it is not easy to determine whether the agent is duly authorized to receive payment, and in all such cases the party who is to pay the money is required to see that the payment is made to one who is authorized to receive it.

Where a promissory note, payable to the order of the payee, but not indorsed by him, is in the hands of one who assumes to be an agent, for the purpose of receiving payment of the note, the mere possession of the note is not alone sufficient evidence of his authority to authorize the maker to pay the money to him. *Doubleday v. Kress*, 50 N.Y. (5 Sick.) 410; 10 Am. Rep. 502; *Wardrop v. Dunlop*, 1 Hun, 325; S. C., 3 N. Y. S. C. (T. & C.) 531.

Possession of a note payable to bearer authorizes a payment to him by the maker. *Woodbury v. Larned*, 5 Minn. 339; *Davis v. Lusitanian*, 20 La. Ann. 24.

An agent who is employed to act in behalf of his principal in making a contract, is not, merely from such employment, to be treated as having an incidental authority to receive the money which may become due under the contract. *Puttock v. Warr*, 3 H. & N. 979; *River Clyde Trustees v. Duncan*, 25 Eng. Law & Eq. 19.

An agent employed to procure the assignment of a bond and mortgage, or to invest money upon such securities, is not thereby authorized to receive either the principal or the interest, when his principal takes and retains possession of the securities. *Williams v. Walker*, 2 Sandf. Ch. 325; 3 N. Y. Leg. Obs. 204.

But if the principal intrusts the agent with the possession of the bond and mortgage, and permits him to receive and indorse payments from time to time until the principal is paid, the principal will be bound by such payments. *Ib. Hatfield v. Reynolds*, 34 Barb. 612.

A subsequent ratification by the principal of a payment made to an agent, not authorized to receive the payment, will bind the principal. *Wardrop v. Dunlop*, 1 Hun, 325; 3 N. Y. S. C. (T. & C.) 531.

An authority by a principal to his agent to receive payment of a debt for him does not, in the absence of any other authority, authorize the agent to receive any thing but money as payment.

Bostick v. Hardy, 30 Ga. 836; *Mudgett v. Day*, 12 Cal. 139; *Prather v. State Bank*, 3 Ind. 356; *Todd v. Reid*, 4 B. & Ald. 210; *Russell v. Bangley*, id. 395; *McCulloch v. McKee*, 16 Penn. St. 289.

Where an agent contracts as though he were the principal, and there is no notice to the other party that there is a principal, a payment to the agent will be good as against a subsequent claim by the real principal. *Traub v. Milliken*, 57 Me. 63; 2 Am. Rep. 14; *George v. Clagett*, 7 Term R. 359; S. C., 2 Smith's Lead. Cas. 125 (185); *Huntington v. Knox*, 7 Cush. 371.

An agent who is merely authorized to collect a debt has no right to take a note from the debtor, for the amount of the debt, payable to himself, and thus substitute himself as creditor; but if he does so, and the principal afterward ratifies the transaction, the latter is bound by the arrangement, and the debtor discharged from the original claim. *McCulloch v. McKee*, 16 Penn. St. 289.

An agent employed to collect a debt, and who takes a negotiable note for the amount, payable to his principal, has no authority to pledge the note as a collateral security for his own debt. *Jones v. Farley*, 6 Greenl. (Me.) 226; *Hays v. Linn*, 7 Watts, 524.

An authority to receive checks, in lieu of cash, in payment of bills placed in the hands of an agent for collection, does not authorize the agent to indorse and collect the checks. *Graham v. United Savings Institution*, 46 Mo. 186.

Payment to an agent by a release or discharge of his own personal debt is not a payment to the principle. *Bostick v. Hardy*, 30 Ga. 836; *Greenwood v. Burns*, 50 Mo. 52; *Catterall v. Hindle*, L. R., 1 C. P. 186, 190.

An agent who is employed to collect a debt which, by the terms of the instrument evidencing it, is payable in a particular sort of currency, has no right to accept payment in any other currency than that so specified, unless by the direction of his principal. *Mangum v. Ball*, 48 Miss. 288.

§ 4. Payments by agents for principals. Where obligations are created, or debts incurred in the course of the agency, the obligations of the principal may be discharged, or the debts paid by the agent. And when the mode of cancelling the obligation, or of paying the debt, is satisfactory to the party entitled to the payment, and he receives it as an absolute discharge of the obligation or debt, this will operate to discharge the principal.

If a factor or other agent is employed to purchase goods for his principal, or he is intrusted with money to pay for them, but the seller should elect to take the note of such factor or agent, payable at a future day, as an absolute payment, the principal will be discharged from the debt, and the creditor's only remedy will be against the factor or agent. *Seymour v. Pychlau*, 1 Barn. & Ald. 14; *Strong v. Hart*, 6 B. & C. 160; *Meeker v. Claghorn*, 44 N. Y. (5 Hand) 349.

Whether the agent's note was accepted as payment is a question of fact. *Porter v. Talcott*, 1 Cow. 359; *Pentz v. Stanton*, 10 Wend. 271.

§ 5. **Torts to property in agent's hands.** It has been seen, *ante*, 281, art. 13, § 4, that an agent may sue a third person for a wrongful injury to the property in his possession.

A principal may maintain an action against any person who wrongfully takes, converts, injures or destroys his personal property, which is in the custody of his agent, for, in such cases the possession of the agent is the possession of the principal. *Aikin v. Buck*, 1 Wend. 466; *Cary v. Hotailing*, 1 Hill, 311, 314; *Thorp v. Burling*, 11 Johns. 285; *Manders v. Williams*, 4 Exch. 339; *Soper v. Sumner*, 5 Vt. 274; *Edwards v. Edwards*, 11 id. 587; *Cutter v. Copeland*, 18 Me. 127.

§ 6. **Wrongful sales or transfers by agent.** An agent who wrongfully and fraudulently transfers his principal's property to a third person, who has knowledge or notice of the fraud, or to one who is not a *bona fide* purchaser for value, does not deprive the principal of his title to the property, nor bar his right of action to recover the property or its value from the person so receiving it. *Frazier v. Erie Bank*, 8 Watts & Serg. 18; *Boyson v. Coles*, 6 M. & Selw. 14; *Clark v. Shee*, Cowp. 197.

ARTICLE XV.

RIGHTS OF THIRD PERSONS AGAINST PRINCIPALS.

Section 1. In general. In the law of agency, it is a fundamental principle that the acts done, or the contracts made, by an agent, within the scope of his authority, is the act or contract of the principal, as much as though he had acted in person in the transaction. Such a rule not only gives him all the rights which accrue, or are secured by such acts or contracts, but it also imposes upon him all the liabilities or disadvantages which may result therefrom. In the investigation of the subject the prin-

principal questions which arise are those which are founded upon contracts made, or upon torts occurring in the course of the business of the agency.

§ 2. **Rights of third persons on agent's contracts.** The right of the principal to sue upon a contract made by his agent is subject to the burden or qualification that he is also liable to be sued upon it by the other contracting party.

The first question that naturally arises in actions by third persons against the principal upon contracts made by an agent, is, had the agent authority to make the contract sued upon. This general subject has been quite fully discussed in the present chapter, *ante*, 240, 257.

If the agent had no authority to make the contract, or if the contract itself is illegal, no action will lie upon it. But, if the contract is legal, and was authorized by the agency created, and is sufficient in form and substance, the general rule is, that the principal is liable upon a breach of such contract on his part. Contracts are as numerous, and as varied in their character and terms, as the business of the public may require. And, for this reason, there can be no enumeration of all the particular cases which are found in the books.

There are some instances in which the principal may be liable even though he did not authorize the contract made, or though it was made in violation of his instructions. Such cases are where the principal holds out the agent to the public, or where he knowingly permits the agent to hold himself out as having authority to make such contracts; for in such cases, the principal will be liable notwithstanding the agent has violated his private instructions by making the contract. If the principal puts it in the power of his agent to make contracts, or to do acts, apparently within his authority, which will result in injury to innocent third persons, or to the principal, the law imposes the loss upon the latter. *VanDuzer v. Howe*, 21 N. Y. (7 Smith) 531; *Redlich v. Doll*, 54 N. Y. (9 Sick.) 234, 238; *Garrard v. Haddan*, 67 Penn. St. 82; 5 Am. Rep. 412; *Hatch v. Taylor*, 10 N. H. 538; *Carmichael v. Buck*, 10 Rich. 332.

Again, where third persons deal with an agent in the belief that he is the real principal, without notice or knowledge that the property involved in such dealing belongs to another, the rights of such third persons will be protected in the same manner as though the agent were the actual principal, *ante*, 257, 258, 284.

So, too, if an agent enters into a contract not authorized by the

principal, but the latter, with full knowledge of all the facts, ratifies it, the contract will then be binding upon the principal, and the other party will have the same protection and rights as though the authority had been originally conferred upon the agent, *ante*. *Hildebrand v. Crawford*, 6 Lans. 502.

The cases in which the rights of parties who deal with agents are most frequently brought in question are those arising from the acts of the agent in the ordinary course of the business of the agency. And since the authorized acts of the agent are the acts of the principal, the acts of the agent while engaged in the usual course of his employment will be binding upon his principal.

A telegraph company is liable for the errors of its agent in the transmission of messages. *Dunning v. Roberts*, 35 Barb. 463.

A common carrier of goods is liable for goods properly delivered to the agent of the carrier, and accepted by him. *Grosvenor v. New York Central R. R. Co.*, 39 N. Y. (12 Tiff.) 34; 6 Trans. App. 311; 5 Abb. (N. S.) 345; *Blanchard v. Isaacs*, 3 Barb. 388; See Carrier.

For illustration of the acts authorized to be done in the course of an agency, see *ante*, 220.

§ 8. **Principal's liability for torts of agent.** A principal who gives express directions to his agent to do acts which are tortious is liable for the injuries resulting from such acts. *Hewett v. Swift*, 3 Allen, 420; *Herring v. Hoppock*, 15 N. Y. (1 Smith) 409; *Hynes v. Jungren*, 8 Kansas, 391; *Jackson v. Second Avenue R. R. Co.*, 47 N. Y. (2 Sick.) 274; 7 Am. Rep. 448.

But a principal is also liable for many of the wrongful acts of his agent, even though he did not expressly authorize them to be done. If an agent is guilty of negligence in the performance of his duties, and a third person receives an injury in consequence, the principal is liable. *Southwick v. Estes*, 7 Cush. 385; *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. (U. S.) 468; *Chapman v. New York Central R. R. Co.*, 83 N. Y. (6 Tiff.) 369; 31 Barb. 399.

The principal is liable for the frauds of the agent when committed in the course of his employment. *Hunter v. Hudson River Iron & Machine Co.*, 20 Barb. 493, 507; *Udell v. Atherton*, 7 Exch. 172; *Jeffrey v. Bigelow*, 13 Wend. 518; *Durst v. Burton*, 47 N. Y. (2 Sick.) 167; 7 Am. Rep. 428; *Locke v. Stearns*, 1 Metc. (Mass.) 560; *Madison R. R. v. Norwich*, 24 Ind. 457;

Tome v. Parkersburgh, etc., R. R. Co., 39 Md. 36; *Veazie v. Williams*, 8 How. (U. S.) 194.

Although the wrongful act of an agent may be such that the principal is not liable for it, yet if he subsequently ratifies it with full knowledge of the facts, he will be liable, and taking advantage of the tort is a ratification of it. *Exum v. Brister*, 35 Miss. 391; *Wallace v. Morgan*, 23 Ind. 599; *Maddux v. Bevan*, 39 Md. 485; *Morehouse v. Northrop*, 33 Conn. 389; *Fitzsimmons v. Joslin*, 21 Vt. 129; *Byram v. McGuire*, 3 Head, 530.

A principal is not liable for a willful tort committed by his agent, if he did not authorize, and has not ratified the act. *Vanderbilt v. Richmond Turnpike Co.*, 2 N.Y. (2 Comst.) 479; 1 Hill, 480; *Tuller v. Voght*, 13 Ill. 277; *Cantrell v. Cohell*, 3 Head, 471.

There are cases in which a principal directs an act to be done by the agent, in a lawful manner, but the agent errs in the mode of executing his authority, to the injury of a third person, for which the principal will be held responsible. A principal who directs his agent to go and get a neighbor's horses, with the expectation on the part of the principal that the agent will obtain them with the owner's permission, but the agent, from a misunderstanding of his instructions, takes the horses without leave, and while using them, kills one of the horses, in this case the principal will be liable for the value of the horse. *Moir v. Hopkins*, 16 Ill. 313.

A principal who sends his agent to a mill-yard of a saw-mill to get boards piled there, and belonging to him, with instructions to the agent to call on the sawyer to point out the principal's boards, will be liable if the agent, while pursuing his instructions, makes a mistake and also takes away the boards of a third person. *May v. Bliss*, 22 Vt. 477.

A principal who directs his agent to cut timber on his land in a designated direction, and the agent, not knowing where the line is, cuts over upon the lands of a third person, the principal will be liable for the injury. *Luttrell v. Hazen*, 3 Sneed (Tenn.), 20.

The liability of one person for the acts of another who is employed in the capacity of a servant, will be fully discussed under the title Master and Servant.

ARTICLE XVI.

TERMINATION OF AN AGENT'S AUTHORITY.

Section 1. In general. The time when, and the manner in which an agency may be terminated will depend upon the nature of the agency itself. It may be terminated by the acts of the parties, or by operation of law. Like every other contract it may be terminated by the mutual consent of the parties. An agency which has no time fixed for its continuance may be terminated at any time by the revocation of the principal, or by the renunciation of the agent. An agency which is to continue for a limited time will terminate by its own limitation at the expiration of that time.

§ 2. **Revocation of authority by principal.** As a general rule, a principal has a right to revoke or terminate the authority given to an agent, at any time when he sees proper to do so. *Brookshire v. Voncannon*, 6 Ired. 231; *Blackstone v. Buttermore*, 53 Penn. St. 266; *Coffin v. Landis*, 46 id. 426; *Jacobs v. Warfield*, 23 La Ann. 395; *Brown v. Pforr*, 38 Cal. 550.

An agent's authority may be revoked by parol, although his appointment was under seal. *Brookshire v. Brookshire*, 8 Ired. 74.

A contract to employ an agent for a year, if he "could fill the place satisfactorily," may be terminated by the employer whenever, in his judgment, the agent fails to meet that requirement of the contract. *Tyler v. Ames*, 6 Lans. 280.

A contract to work for a specified time, which provides that the employee may leave in case of a disagreement between the parties, authorizes the employer to terminate the contract whenever a *bona fide* disagreement occurs. *Gates v. Davenport*, 29 Barb. 160.

An authority may be irrevocable when it is expressly agreed that it shall be so, and where, in addition, the agent has an interest in the execution of the authority. *Hunt v. Rousmanier's Admr.*, 8 Wheat. 174; *Goodwin v. Bowden*, 54 Me. 424; *Blackstone v. Buttermore*, 53 Penn. St. 266.

A power of attorney is irrevocable where it is a security for money advanced. *Ib.*

§ 3. **Mode of revocation.** The revocation of an agent's authority may be express, as by a direct notification of that fact to the agent. It is not necessary, however, that there should be an

express revocation ; it may be implied from facts and circumstances.

Generally the revocation of an agent's authority takes effect as to him, from the time when such revocation is made known to him. *Weile v. United States*, 7 Ct. of Cl. 535 ; *Robertson v. Cloud*, 47 Miss. 208 ; *Jones v. Hodgskins*, 61 Me. 480.

Where third persons deal in good faith with one who was duly authorized as an agent, a revocation of the agent's authority will not affect the dealings of such third persons with the agent, until notice of the revocation is given to them. *Fellows v. Hartford, etc., Steamboat Co.*, 38 Conn. 197 ; *Tier v. Lampson*, 35 Vt. 179 ; *Dicersy v. Kellogg*, 44 Ill. 114 ; *Beard v. Kirk*, 11 N. H. 397 ; *Morgan v. Still*, 5 Binn. 305.

§ 4. **Renunciation of agent.** An agency may be terminated by the renunciation of the agent. But if the agency is founded upon a valuable consideration, or it has been partially executed, the agent, by renouncing it, and leaving the business of the agency unfinished, will be liable for the damages which his principal may sustain in consequence. *Thorne v. Deas*, 4 Johns. 84 ; *White v. Smith*, 6 Lans. 5 ; *Gill v. Middleton*, 105 Mass. 479 ; *Elsee v. Gatward*, 5 T. R. 143.

An agency, though voluntary and gratuitous, if partially executed, cannot then be renounced to the principal's damage, without liability upon the part of the agent to make the loss good. *Ib.*

§ 5. **Termination by operation of law.** The bankruptcy of the principal revokes the agent's authority as to the property divested by the bankruptcy. *Minnett v. Forrester*, 4 Taunt. 541 ; *Parker v. Smith*, 16 East, 382.

The insanity of the principal may operate as a revocation of an agency, but the courts will require clear evidence that the insanity is of a character to prevent the principal from making a valid contract, before they will declare an agency revoked for that cause. *Motley v. Head*, 43 Vt. 633 ; *Davis v. Lane*, 10 N. H. 156, 159. Insanity on the part of an agent, which incapacitates him from making valid contracts, ought to operate as a revocation of his authority. Story on Agency, § 487.

§ 6. **Revocation by death of principal.** The death of a principal is a revocation of the agent's authority. *Davis v. Windsor Savings Bank*, 46 Vt. 728 ; *Hunt v. Rousmanier*, 8 Wheat. 174-217 ; 1 Am. Lead. Cas. 700 (576) ; *Saltmarsh v. Smith*, 32 Ala. 407 ; *Galt v. Galloway*, 4 Peters, 333, 344 ; *Yale v. Tappan*, 12 N. H. 146, 148 ; *Coney v. Saunders*, 28 Ga. 511 ; *Houghtaling v.*

Marvin, 7 Barb. 412 ; see Story on Agency, § 488 ; *Lewis v. Kerr*, 17 Iowa, 73 ; *Primm v. Stewart*, 7 Tex. 178 ; Whart. on Agency, § 104.

§ 7. **Revocation by death of agent.** The death of an agent necessarily terminates the agency. *Gage v. Allison*, 1 Brevard, 495 ; *Merrick's Estate*, 8 Watts & Serg. 402.

Where a power or authority is conferred upon two persons, the death of one of them terminates the agency. *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180 ; *Martine v. International Life Ins. Society*, 53 N. Y. (8 Sick.) 339 ; 13 Am. Rep. 529.

Where two persons are jointly appointed agents to take charge of the principal's business for a specified term, and one of the agents becomes incapacitated before the end of such term, the business cannot be performed by the other agent alone without the consent of the principal, who may, if he chooses, discontinue the agency. *Salisbury v. Brisbane*, 61 N. Y. (16 Sick.) 617.

CHAPTER IX.

ANCIENT LIGHTS.

TITLE I.

GENERAL RULES AND PRINCIPLES.

ARTICLE I.

OF THE ENGLISH RULE.

Section 1. Right by prescription. It is a doctrine of the common law of England, long recognized by the English courts, that if one be possessed of a house with windows opening upon the land of another, for a long period of time, they cannot be obstructed so as to deprive him of the light, as he has been accustomed to enjoy it. *Bury v. Pope*, Cro. Eliz. 118; *Palmer v. Fletcher*, 1 Lev. 122; *Aldred's Case*, 9 Co. 58; *Villers v. Ball*, 1 Show. 7; *Lewis v. Price*, cited 2 Saund. 175. But in order that lights may be entitled to this special protection, they must be *ancient*; and it would seem from some of the early English cases just cited, that lights of thirty or forty years' standing were not to be deemed ancient within the requirements of the old rule on the subject. However this may have been formerly, the period of prescription or limitation became shortened in modern times, and it was stated, as settled law, that *twenty years'* quiet and uninterrupted possession of window lights was sufficient ground for a jury to presume a grant or covenant, provided there was evidence that the owner or landlord (and not the tenant, merely) of the opposite premises had knowledge during the twenty years of the fact. *Daniel v. North*, 11 East, 371; *Back v. Stacy*, 2 Russ. 121; *Lanfranchi v. MacKenzie*, L. R., 4 Eq. 421; *Livett v. Wilson*, 3 Bing. 115; *Barker v. Richardson*, 4 B. & A. 579; *Cross v. Lewis*, 2 B. & C. 686; S. C., 4 D. & R. 234; 4 Kent's Com. 448. The doctrine has been stated at length that, if a man build a house upon his own land, near that of his neighbor, and place windows in his house, through which the light from over his neighbor's land passes in, though in thus appropriating this light he commits no ouster or disseizin, and is

guilty of no wrong remediable by action, and though his neighbor has no means of defeating this enjoyment but by building a wall on his own land, which shall obstruct its passage, yet if he abstains from doing so and permit the use and enjoyment of the light passing through the windows for a great length of time (fixed by many cases at twenty years in analogy to the statute of limitations, as to the possessory title to land), the presumption of right will be indulged in favor of this long possession, and in the absence of countervailing circumstances, will be held conclusive; and he will be subject to an action if he subsequently obstruct these ancient lights by building a wall even upon his own land. *Manier v. Myers*, 4 B. Mon. (Ky.) 514, 520; see, also, *McCready v. Thomson*, Dudley (S. C.), 131; *Gerber v. Grabel*, 16 Ill. 217; *Mahan v. Brown*, 13 Wend. 251. Such is the doctrine of the English common law, as it has been recognized and applied by the English courts prior to any statutory provisions on the subject.

§ 2. **By statute in England.** An English statute now provides that, "when the access and use of light to and from any dwelling-house, workshop, or other building shall have been actually enjoyed for the full period of twenty years, without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary, notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose, by deed or writing." 2 and 3 Will. 4, c. 71, s. 3. The right to "ancient lights" now depends upon this statute, and not upon any presumption of grant or fiction of license; and being an absolute, indefeasible, and unqualified statutory right, cannot be lost by a subsequent intermission of enjoyment, not amounting to intentional abandonment, nor can it be prejudiced by an attempt to extend the access of light beyond that access which has so become indefeasible. *Tapling v. Jones*, 11 H. L. Cas. 290; S. C., 20 C. B. (N. S.) 166; 34 L. J., C. P., 344; and see *Harbridge v. Warwick*, 3 Exch. 556; S. C., 18 Law J., Exch., 245; *Flight v. Thomas*, 8 Cl. & Fin. 231.

§ 3. **Implied grant.** It is a well-settled rule of the common law, that wherever the owner of land has, by any artificial arrangement, created an advantage or incident for the benefit of one portion to the burdening of the other, upon a severance of the ownership, the holders of the two portions take them respectively charged with the servitude and entitled to the benefit

openly and visibly attached at the time of the conveyance of the portion first granted. *United States v. Appleton*, 1 Sumner, 492; *Lampman v. Milks*, 21 N. Y. (7 Smith) 505; *Butterworth v. Crawford*, 46 N. Y. (1 Sick.) 349; S. C., 7 Am. Rep. 352; *Story v. Odin*, 12 Mass. 157; *Ewart v. Cochrane*, 7 Jur. (N. S.) 925; *Hall v. Lund*, 1 H. & Colt. 676; *Pyer v. Carter*, 1 H. & N. 916. As it regards easements for light and air over the premises of another, this rule has been frequently applied in England. Generally, if the owner of a building has windows overlooking an adjoining lot, the owner of the latter may build directly in front of the windows so as entirely to obstruct their light, unless they are shown to be *ancient*. If, however, both proprietors obtained their title from a common source, the same grantor having conveyed the tenement with the windows to one, and the ground overlooked to another, the windows cannot be obstructed. And the reason assigned is, that the relative qualities of the two tenements must be considered as fixed at the time of their severance; each retains, as between it and the other, the properties then visibly attached to it, and neither party has a right afterward to change them. *Cox v. Matthews*, Ventris, 237; *Palmer v. Fletcher*, 1 Lev. 122; *Compton v. Richards*, 1 Price, 27; *Carham v. Fisk*, 2 Cr. & J. 128; *Swansborough v. Coventry*, 9 Bing. 305; *Roswell v. Pryer*, 6 Mod. 116; S. C., 12 id. 215. *Hubbard v. Town*, 33 Vt. 295; *Lampman v. Milks*, 21 N. Y. (7 Smith) 505. The time during which the lights have been enjoyed has nothing to do with the rule in these cases. Whether they have existed for twenty years or for a single day, they are equally protected. Id. *Robbins v. Barnes*, Hob. 131; *Coutts v. Graham*, 1 Mo. & Mal. 396. A free passage over the vendor's adjoining unsold land for so much light and air as may be reasonably necessary for the beneficial occupation and enjoyment of the house is *impliedly granted* by the vendor, unless the privilege is excluded by the express terms of the conveyance. See cases cited above; Add. on Torts, 94.

ARTICLE II.

OF AMERICAN CASES SIMILAR TO THE ENGLISH RULE.

Section 1. As to ancient lights. It is clear that no easement or servitude of a right of prospect can be acquired at common law by any mere length of enjoyment. Hence, an action does not lie for obstructing a view, unless upon express covenant.

Harwood v. Tompkins, 24 N. J. L. (4 Zab.) 425; *Parker v. Foote*, 19 Wend. 309. But the English doctrine of a right to lights overlooking another's ground, acquired by long user, upon a presumption of a grant, or otherwise, has been maintained in a number of early American cases, and is recognized as existing law in the States of Illinois, New Jersey and Louisiana. See *Gerber v. Grabel*, 16 Ill. 217; *Robeson v. Maxwell*, 2 N. J. Eq. (1 Green) 57; *Barnett v. Johnson*, 15 N. J. Eq. (2 McCart.) 481; *Durel v. Boisblanc*, 1 La. Ann. 407. So, this doctrine was assumed to be the law in South Carolina in *McCready v. Thomson*, Dudley, 131. But, in a subsequent and more carefully considered case (*Napier v. Bulwinkle*, 5 Rich. 311), the doctrine was discarded. Likewise, in Alabama, the English doctrine was sustained in *Ray v. Lyles*, 10 Ala. 63; since overruled, however, in *Ward v. Neal*, 35 Ala. 602; S. C., 37 id. 501.

With the exceptions above noted, the English doctrine of ancient lights has not been adopted in this country. On the other hand, the doctrine has been expressly rejected in numerous well-considered cases, as being inapplicable here, because, if adopted, it would greatly interfere with and impede the rapid changes and improvements constantly going on in our cities and villages. See *post*, 290, art. 3.

§ 2. As to implied grant. The English doctrine as to the acquisition of easements to light, by *implied grant* (*ante*, § 3), has been fully accepted in some of the American cases, while in others it has been wholly rejected or its existence denied. In *Story v. Odin*, 12 Mass. 157, which is believed to be the earliest American case in which the doctrine is discussed, the law was stated in accordance with the English authorities. But, in a very recent Massachusetts case, all the authorities, including that of *Story v. Odin*, *supra*, are carefully reviewed, and, as a result, the law is stated to be, that no grant of any right of light or air over adjoining lands is to be implied from the conveyance of a house, having windows overlooking land retained by the grantor. *Keats v. Hugo*, 115 Mass. 204; S. C., 15 Am. Rep. 80. In a late case in Ohio, the same conclusion was arrived at, and the weight of American decisions was stated to be in accordance therewith. *Mullen v. Stricker*, 19 Ohio St. 135; S. C., 2 Am. Rep. 379. In confirmation of this statement, see *Morrison v. Marquardt*, 24 Iowa, 35; *Haverstick v. Sipe*, 33 Penn. St. 368; *Doyle v. Lord*, 39 Sup. Ct. (N. Y.) 421; affirming S. C., 48 How. 142; *Johnson v. Oppenheim*, 55 N. Y. (10 Sick.) 280, 293; *Myers v.*

Gemmel, 10 Barb. 537; *Palmer v. Wetmore*, 2 Sandf. (N. Y.) 316. In Maryland the English doctrine is, however, sustained, and the easement and servitude of light may be implied from grant. Thus, it is held that, by the grant of a lot and all the rights, "privileges, appurtenances and advantages to the same belonging or in any wise appertaining," is passed the easement of light and air as to windows previously opened toward another lot of the grantor; and the existence of the easement and the enjoyment thereof by the grantee is no breach of a special warranty contained in a subsequent deed of the other lot to another grantee. *Janes v. Jenkins*, 34 Md. 1; S. C., 6 Am. Rep. 300. And see, in support of this doctrine, *United States v. Appleton*, 1 Sumner, 492; *Thurston v. Mink*, 32 Md. 487; *Lampman v. Milks*, 21 N. Y. (7 Smith) 505; *Oregon Iron Company v. Trullinger*, 3 Oregon, 1; *Biddle v. Ash*, 2 Ashm. (Penn.) 211.

ARTICLE III.

OF THE AMERICAN RULE.

Section 1. In general. The English doctrine of "ancient lights," or prescriptive right to light and air by long user, is but partially recognized as existing in a few of the American States. See *ante*, 295, art. 2, § 1. By the course of decision in most of the States, it is declared to form no part of the law of this country. It is wholly unsuited to the condition of our growing cities and villages, and cannot be applied to them without working the most mischievous consequences. See *Parker v. Foote*, 19 Wend. 309; *Pierre v. Fernald*, 26 Me. 436; *Mullen v. Stricker*, 19 Ohio St. 135; S. C., 2 Am. Rep. 379; *Cherry v. Stein*, 11 Md. 1; *Ward v. Neal*, 37 Ala. 500; *Hubbard v. Town*, 33 Vt. 295; *Haverstick v. Sipe*, 33 Penn. St. 368; *Mahan v. Brown*, 13 Wend. 261; *Myers v. Gemmel*, 10 Barb. 537; *Powell v. Sims*, 5 W. Va. 1.

So, the reasons upon which it has been held that no grant of a right to light and air can be implied from any length of continuous enjoyment, are said to be equally strong against implying a grant of such a right from the mere conveyance of a house with windows overlooking the land of the grantor. "To imply the grant of such a right in either case, without express words, would greatly embarrass the improvement of estates, and, by reason of the very indefinite character of the right asserted, promote litigation. The simplest rule, and that best suited to a country like ours, in which changes are continually taking place in the own-

ership and the use of lands, is, that no right of this character can be acquired without express grant of an interest in or covenant relating to the lands over which the right is claimed." *Keats v. Hugo*, 115 Mass. 204; S. C., 15 Am. Rep. 80, 91; and see *Mullen v. Stricker*, 19 Ohio St. 185; S. C., 2 Am. Rep. 379. From a review of the whole subject, the general doctrine of the American courts would seem to be that an implied grant of an easement of light will not be sustained except in cases of real necessity, and will be denied when it appears that the owner of the dominant estate can, at a reasonable expense, have other lights to his building. *Powell v. Sims*, 5 W. Va. 1; and see *Havens v. Klein*, 49 How. (N. Y.) 95.

CHAPTER X.

ANIMALS.

TITLE I.

OF THE OWNERSHIP OF ANIMALS, AND OF THE RIGHTS,
DUTIES AND LIABILITIES OF THEIR OWNERS OR POS-
SESSORS.

ARTICLE I.

OF THE OWNERSHIP OF ANIMALS.

Section 1. Definition, and general principles. The word "animal" is frequently, if not generally, used in contradistinction to the words "bird," "fish," "insect," and the like. But, in the discussion of the subject in this chapter, it will be used in its extensive meaning of a living being, with an organized, material body, endowed with the power of sensation and voluntary motion, and, of course, excluding human beings; but generally including all that wing the air, that roam the fields, or swim the floods.

• **§ 2. What animals are subject of property.** The common law of this country, as well as that of England, regards all animals as capable of being subjects of property or ownership, either qualified or absolute. The division of animals is into two principal classes, one of which is wild, and the other tame. Animals of a wild nature, while at liberty and unreclaimed, are not subjects of absolute property. Tame animals are subjects of absolute property. An animal which was once wild, may become tame, and thus become a subject of ownership like other tame animals. So wild animals may be captured and reduced into actual possession, and thus become the property of the captor; or they may be killed, and thus become property. Wild geese that have been tamed and reclaimed are subjects of property. *Amory v. Flynn*, 10 Johns. 102. Bees are of a wild nature, but they may be reclaimed and hived, and thus become the property of the possessor. *Gillet v. Mason*, 7 Johns. 16. A dog is a species of property, and his owner may maintain an action against a third person who wrongfully injures or kills him. *Dunlap v. Snyder*, 17 Barb. 561; *Parker v. Mize*, 27 Ala. 480. 483; *Dod-*

son v. Mock, 4 Dev. & Bat. 146; *Wheatley v. Harris*, 4 Sneed, 468; *Wolf v. Chalker*, 31 Conn. 121; *Harrington v. Miles*, 11 Kans. 480. The rule is the same as to cats. *Whittingham v. Ideson*, 8 Upper Canada Law Journal, 14.

Doves are of a wild nature, and though not the subject of larceny in a wild state, they may become property, and subjects of larceny, if they are in the care and custody of a person who has them in his dove cot or pigeon-house, or if they are in a nest and unable to fly. *Commonwealth v. Chace*, 9 Pick. 15. Pigeons may become property, and where they are so tame that they return home every night to roost in wooden boxes hung on the outside of the house of their owner, they are subjects of larceny. *Rex v. Brooks*, 4 Carr. & Payne, 131. Partridges may become property, and when they have been hatched and reared by a common hen, and while they remain with her, they are practically under the power and dominion of the owner of the hen. *Reg. v. Spickle*, L. R., 1 C. C. 158; 11 Cox's C. C. 189. A turkey is a domestic animal, and a species of property. *Stale v. Turner*, 66 N. C. 618. And the rule is the same as to a peacock. *Commonwealth v. Beaman*, 8 Allen, 497.

Oysters planted by an individual in a bed clearly designated and marked out in navigable waters, which are free to all the inhabitants of the State, are the property of the person who planted them. *Fleet v. Hegeman*, 14 Wend. 42; *Decker v. Fisher*, 4 Barb. 592; *Lowndes v. Dickerson*, 34 id. 586.

Inasmuch as every kind of domestic animal is a species of property, it is not necessary to search for all the cases which have been decided in relation to the various kinds of animals held to be property.

And, in relation to wild animals, although not generally property, when wild, and free, yet when tamed, or when in actual confinement, as in cages, or other mode of actual possession and control, they are as such property as tame animals. The owner of the animals in a menagerie is as much protected in his property as the owner of the animals or stock upon a farm.

§ 3. **What animals are not subjects of property.** There is no absolute property in wild animals, free, and in a state of nature. And while they remain at large, and untamed, they are not the subjects of ownership. If they are caught and confined, they are property so long as they are in the possession and under the control of the captor or possessor. But, if they escape, and

regain their natural liberty, the owner's qualified property ceases, and the animals cease to be property.

If, however, wild animals have been tamed, and they stray away from their owner, but without regaining their natural liberty, the owner does not lose his property in them. *Amory v. Flynn*, 10 Johns. 102.

§ 4. Title to animals, how acquired. The title to animals may be acquired in any of the modes by which other personal property is acquired, as by sale, gift, inheritance, and the like.

The property in wild animals is in the owner of the land on which they are started and captured, and not in the captor. *Blades v. Higgs*, 12 C. B. (N. S.) 501; 8 Jur. (N. S.) 1012; 10 W. R. 318; 5 L. T. (N. S.) 752; affirmed, 13 B. C. (N. S.) 844; 32 L. J. (C. P.) 182; 7 L. T. (N. S.) 834; and in H. L. 11, H. L. Cas. 621; 13 W. R. 927; 34 L. J. (C. P.) 286; *Goff v. Kilts*, 15 Wend. 550. Wild bees, in a bee-tree, belong to the owner of the soil where the tree stands. *Ferguson v. Miller*, 1 Cow. 243; *Adams v. Burton*, 43 Vt. 30; *Idol v. Jones*, 2 Dev. L. (N. C.) 162; *Cock v. Weatherby*, 5 Sm. & Marsh. 333.

The mere finding of a swarm of bees in a tree upon the lands of another, and marking the tree with the initials of the finder's name, does not give him any property in the bees. *Gillet v. Mason*, 7 Johns. 16.

So, if a person finds a swarm of bees, in a tree upon the lands of another, who gives him permission to take them, and he then marks the tree with his initials, but does nothing more, this will not entitle him to recover the value of the bees from a third person who afterward took them by the permission of the owner of the tree. *Ferguson v. Miller*, 1 Cow. 243. But, if the finder of the bees is engaged in the act of cutting down the tree, by the permission of the owner, and while thus engaged, he is driven away from such work and prevented from cutting down the tree, by a third person, who, subsequently to the first license, obtained a license from the owner of the tree to take the bees, but without revoking the first license, the person first beginning to cut the tree will have a superior right to the bees, and may maintain an action against such third person for cutting down the tree and taking away the bees and honey. *Adams v. Burton*, 43 Vt. 30, 36.

If bees have been reclaimed and hived, but leave the hive and go into a tree upon the lands of another person, the owner of the bees may maintain an action against a third person who de-

stroys the bees and takes the honey. *Goff v. Kilts*, 15 Wend. 550. The owner of the bees retains his title in them so long as he can identify them, and is able to regain his possession of them. *Ib.*

The title to oysters may be acquired by planting, as has been seen, *ante*, 299, §2. But, a person who plants oysters in navigable waters, opposite to the lands of another person, does not thereby acquire such a possession of them as will enable him to maintain an action against such adjacent owner for taking them away. *Brinckerhoff v. Starkins*, 11 Barb. 248; see, also, *Arnold v. Mundy*, 1 Halst. (N. J.) 1; *State v. Taylor*, 3 Dutch. (N. J.) 117; 1 Broom & Had. Com. 799, 800, 436, 437 Wait's ed.

The natural increase of domestic animals belongs to the owner of the mother of the animals thus produced. *Hanson v. Millett*, 55 N. H. 184; *Stewart v. Ball*, 33 Mo. 154; *Concklin v. Havens*, 12 Johns. 314. If, however, the dam or mother is hired out for a limited time, the increase during that period belongs to the hirer of the animal. *Ib.*

If the owner of a mare offers the use of her to be put to horse, and promises another person that if he will have her put to horse, and pay the charges for it, he shall own the foal or colt, if any, and such person has the mare put to horse, and pays the charges, and afterward has complete charge and possession of the foal, the title to it will be in him. *Linnendoll v. Terhune*, 14 Johns. 222. But, if the agreement is such, that, by its terms, it cannot be performed within a year, the agreement will be void by the statute of frauds, and the title to the colt will be in the owner of the mare. *Lockwood v. Barnes*, 3 Hill, 128; *Harman v. Reeve*, 18 C. B. 587.

Mere pursuit of a wild animal does not give the pursuer any property in it, and, therefore, no action lies against a person for killing and taking a fox, which was pursued by, and in view of the hunter who found, started and pursued it, and was on the point of seizing it when killed by such other person. *Pierson v. Post*, 3 Caines, 175. So, a hunter who pursues a deer and wounds it, and follows its track by its blood, until night, when he abandons the pursuit for the night, but resumes it in the morning, has no title to it as against one who killed it the night before. *Buster v. Newkirk*, 20 Johns. 75. So where a person is engaged in fishing, and has nearly encompassed a quantity of fish with his net, and a third person, by rowing his boat, and splashing the water about, frightens the fish so that

they escape, no title is acquired to the fish, and no action lies against the wrong-doer for the value of the fish, on the ground that they belong to the owner of the net, or that they were in his possession. *Young v. Hichens*, 6 Ad. & E. (N. S.) 606. As to the right to take fish, see 1 Broom & Had. Com. 436, 437, Wait's ed.

§ 5. **Title, how transferred or lost.** It may be said, generally, that the title to animals may be transferred by any mode which is sufficient to transfer the title to other personal property. It may be transferred by sale, gift, inheritance; or, if the property be wild animals, then it may be by their escape and return to a state of nature, *ante*, 299, § 3. Whether deer in a park go to the heir with the land, or to the executor, see *Morgan v. Abergavenny*, 8 Man. Gr. & Scott, 768; *Ford v. Tynte*, 2 Johns. & H. 150. When reclaimed they become personal property. *Ib.*

ARTICLE II.

RIGHTS OF OWNERS OR POSSESSORS OF ANIMALS.

Section 1. Rights of the owner of animals. The rights of the owner of an animal are the same as those of the owner of any other personal property. He may use, sell, or give it away. If it is wrongfully taken, detained, destroyed or injured, he may maintain an action for the recovery of its possession, or for damages for its destruction or injury. See *post*, 302-306, §§ 3, 4, 5.

§ 2. **Rights of the possessor of animals.** It may be said, generally, that the rights of the possessor of animals are the same that they would be in relation to other personal property. A wrongful injury to his rights as possessor of the property will give him a right of action against the wrong-doer, according to the nature of the interest of the possessor and the character of the wrong-doer. For wrongfully taking the property from his possession, or for wrongfully detaining it, the law gives the injured party a remedy by action for the recovery of its possession. See *Replevin*. If the injury to the property is such as to injure the possessor's rights in it, an action lies for the resulting damages. See *Case*; *Trespass*; *Trover*.

§ 3. **Wrongfully taking animals.** The injury arising from a wrongful taking of animals or other personal property is generally an injury to the possession, or the rights of possession. In some cases, it may be desirable to regain the possession of the animal taken, while in others a recovery of damages for the wrong would be a satisfactory remedy. Where it is desired to

regain the possession of the property, an action of replevin is usually a prompt and efficient remedy. See Replevin. If damages will afford a satisfactory compensation for the injury, an action on the case, or of trespass, or trover, may be resorted to as a remedy.

In some cases, the injured party may treat the wrong-doer as though he were a purchaser of the property wrongfully taken by him. The law permits a waiver of the tort, and allows a recovery of the value of the property, in the same manner it would had there been a sale instead of a wrongful taking of such property. See Waiver of Tort; Assumpsit.

An officer has no right to detain horses, on the ground that they are running at large, in violation of a town ordinance, where the horses escaped from their owner's inclosure against his will, and when he immediately went in pursuit of them. *Kinder v. Gillespie*, 63 Ill. 88; see *Walters v. Glats*, 29 Iowa, 437.

An owner of land has no right to detain a domestic animal belonging to a neighbor, which has strayed upon his land, on several occasions, and done injury, until he is paid all the damages for such injuries. *Ladue v. Branch*, 42 Vt. 574. His right is limited to removing the animal from his land, or to impounding it according to law. *Ib.*; *Pratt v. Petrie*, 2 Johns. 191; *Sackrider v. McDonald*, 10 id. 253; *Merritt v. O'Neil*, 13 id. 477; *Hale v. Clark*, 19 Wend. 498.

A person who finds a horse at large, and takes it into his possession and uses it in such a manner that it is injured, will be liable to the owner for such injury. *Murgoo v. Cogswell*, 1 E. D. Smith, 359.

§ 4. Wrongful destruction of animals. In many cases the right to maintain an action depends upon the plaintiff's right of possession of the property destroyed. But the real owner of an animal may maintain an action for the injury to his reversionary rights in it, although at the time of its destruction the right of possession for a temporary period was in another person.

The owner of a dog may maintain an action against one who wrongfully kills or injures him. *Brent v. Kimball*, 60 Ill. 211; *Uhlein v. Cromack*, 109 Mass. 273; *Wheatley v. Harris*, 4 Sneed, 488; *Dodson v. Mock*, 4 Dev. & Bat. L. (N. C.) 146; *Perry v. Phipps*, 10 Ired. (N. C.) 259; *Parker v. Mise*, 27 Ala. 480, 483.

But no action lies against a railroad company for running over and killing a dog which goes upon its track without any author-

ity from the company. *Wilson v. Railroad Company*, 10 Rich. (S. C.) 52.

An action lies for unlawfully killing a cat. *Whittingham v. Ideson*, 8 Upper Canada L. J. 14.

So an action lies for killing domestic fowls, such as hens, even though they were trespassing at the time upon the lands of the person who killed them. *Matthews v. Friestel*, 2 E. D. Smith, 90; *Clark v. Keliher*, 107 Mass. 406; *Johnson v. Patterson*, 14 Conn. 1, 11.

It is actionable to kill a hog which has killed one chicken, and attempted to kill another, even though found about seventy-five yards from the place where the defendant's chickens usually ran, and where the hog was killed. *Morse v. Nixon*, 6 Jones' Law (N. C.), 293; 1 Broom & Had. 800, note Wait's ed.

The right to maintain an action for the wrongful killing of domestic animals is so well settled, and so well known, that the citation of authorities seems unnecessary.

Actions have been maintained in numerous cases for unlawfully killing sheep. *Bessant v. Great Western R. Co.*, 8 C. B. (N. S.) 368.

Or horses. *Chapman v. New York Central R. R. Co.*, 31 Barb. 399; 33 N. Y. (6 Tiff.) 369; *Bishop v. Ely*, 9 Johns. 294. See Negligence; Railroads.

Or mules. *Louisville & Nashville R. R. Co. v. Wainescott*, 3 Bush, 149.

Or cows or other cattle. *McDowell v. New York Central R. R. Co.*, 37 Barb. 195; *Indianapolis, etc., R. R. Co. v. Truitt*, 24 Ind. 162; *Van Leuven v. Lyke*, 1 N. Y. (1 Comst.) 515; 4 Denio, 127; *Angus v. Radin*, 2 South. 815.

Or swine. *Morse v. Nixon*, 6 Jones' L. (N. C.) 293.

One who sells hay upon which a poisonous substance has been spilt, is liable in damages to the purchaser of the hay, if his cow eats it and is thereby poisoned and killed. *French v. Vining*, 102 Mass. 132; 3 Am. Rep. 440.

The general right to maintain an action for wrongfully killing domestic animals is not usually disputed; but it is claimed that some facts or circumstances in the particular case excused or justified the killing.

Actions are frequently brought against railroad corporations for killing animals, and the usual defense is interposed that the animals were wrongfully upon the track, and that the owner's negligence contributed to the result, and bars his right of action.

McDonnell v. Pittsfield & North Adams R. R., 115 Mass. 564; *Eames v. Salem & Lowell R. R.*, 98 id. 560; *Maynard v. Boston & Maine R. R.*, 115 id. 458; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; 4 N. Y. (4 Comst.) 349; *New York & Erie R. R. Co. v. Skinner*, 19 Penn. St. 298; *Cincinnati, etc., R. R. Co. v. Waterson*, 4 Ohio St. 424; *Towner v. Providence & Worcester R. R.*, 2 R. I. 404; *Louisville & Frankfort R. R. v. Ballard*, 2 Metc. (Ky.) 177; *Vandegrift v. Rediker*, 2 Zab. 185.

It is not to be understood from these cases that an action could not have been maintained if the killing had been intentional; but merely that an owner who permits his animals to trespass upon a railroad track, must take the chances of their being killed by the trains which are running in a proper manner. *Ib.*; *Shearm. & Redf. on Neg.*, § 454.

An action will not lie against the owner of land, for carelessly leaving maple syrup in open buckets on his uninclosed woodland, where the cow of a third person wrongfully enters upon the land, and drinks the syrup, which causes her death. *Bush v. Brainard*, 1 Cow. 78. Nor for leaving open a hole in the ground of his uninclosed woodlands into which trespassing cattle fall. *Knight v. Abert*, 6 Penn. St. 472.

§ 5. **Wrongful injury of animals.** The same principles of law which give a remedy for destroying animals, also give a similar remedy for a wrongful injury done to them. See *ante*, 303, § 4.

A person who chases a horse out of his field with a large fierce dog does an unlawful act, and is liable to the owner of the horse for any injury caused by such act. *Amick v. O'Hara*, 6 Blackf. 268. A railroad corporation which neglects to provide barriers, or to fence its track according to law, is liable for injuries done to cattle which enter upon its track in such unfenced or unprotected place. *Keliher v. Conn. River R. R. Co.*, 107 Mass. 311; see, also, *Negligence; Railroads*.

One who wrongfully drives his horse and wagon against the horse of another who is lawfully in the highway, is liable for the injury done to such horse. *Bishop v. Ely*, 9 Johns. 294.

An action lies against one who hires a horse to go to a particular place, but wrongfully goes farther, or to a different place, and injures the horse in so doing. *Disbrow v. Tenbroeck*, 4 E. D. Smith, 397; *Lucas v. Trumbull*, 15 Gray, 306. The owner of the horse may ratify the wrongful act, and will do so by receiving payment for the full distance traveled, so far as it relates to a conversion of the horse. *Ritch v. Hawes*, 12 Pick.

135. If the hirer has injured the horse by ill usage on the journey, the action must be brought for that. *Ib.*

One who hires a horse for a particular journey is only responsible for negligence, unskillfulness, or willful misconduct; and, if the horse becomes lame, or is injured, while properly treated, the hirer will not be liable. *Harrington v. Snyder*, 3 Barb. 380; *Millon v. Salisbury*, 13 Johns. 211. So, one who is employed to drive horses, which are injured while using them, will not be liable for the damages resulting, unless the injury was caused by his negligence, unskillfulness, or willful misconduct, and the burden of proving this lies on the owner of the horses. *Newton v. Pope*, 1 Cow. 109.

§ 6. **Wrongful conversion of animals.** An action will lie for the conversion of animals whenever an action may be sustained for a wrongful taking of them, or for an unlawful conversion of them, even where the original taking was lawful. See *Trespass*; *Trover*.

And, as an illustration of a conversion of a horse whose possession was lawfully obtained, the hiring of a horse to go to a particular place, and then driving the horse to a more distant, or to different place, will be a conversion of the horse, for which an action will lie. *Disbrow v. Tenbroeck*, 4 E. D. Smith, 397; *Lucas v. Trumbull*, 15 Gray, 306; *Fish v. Ferris*, 5 Duer, 49. The owner may waive the right of action for a conversion by accepting payment for the full distance traveled. *Ritch v. Hawes*, 12 Pick. 135.

§ 7. **Rights as to mode or place of keeping.** It is a general maxim of the law that every person shall enjoy his own property in such a manner as not to injure that of another person. *Broom's Leg. Max.* 365. But, as has already been stated, *ante*, 143, 144, there are many acts which may be done that are injurious to another, and yet the injured party will have no right of action.

The owner of land may use it for the purpose of pasturing his sheep which have an infectious disease, and he will not be liable to an adjoining land owner though his sheep become diseased in consequence. *Fisher v. Clark*, 41 Barb. 329.

But, while one has a right to use his own premises as a hospital for his diseased horses, he has no right to permit horses which have a contagious disease to go at large in the highway, or to water them at a public tank used for watering the sound horses of other persons; and, if the horses of such other per-

sons become infected with the disease to the injury of their owner, an action lies for the damages sustained. *Mills v. New York & Harlem R. R. Co.*, 2 Rob. 326; affirmed, 41 N. Y. (2 Hand) 619, *n*.

And, if the owner of glandered horses takes them upon the farm of another person having sound horses, which become infected with the disease, and die of it, an action lies for thus communicating the disease to the sound horses. *Hite v. Blandford*, 45 Ill. 9; *Penton v. Murdock*, 18 W. R. 382; 22 L. T. (N. S.) 371. So where diseased sheep are permitted by their owner to trespass upon the lands of another person, whose sheep are infected, and die in consequence, an action may be maintained by the injured party against the owner of the trespassing sheep. *Barnum v. Vandusen*, 16 Conn. 200. And a person who is permitted to occupy land, under a mere license, will be liable to an action if he pastures diseased sheep upon it, which communicate the disease to the sheep of the licensor, who was ignorant of the nature of the disease, and who was falsely informed by the party pasturing the sheep there, that there was no danger from such diseased sheep. *Eaton v. Winnie*, 20 Mich. 156; 4 Am. Rep. 377; see, also, *Mullett v. Mason*, L. R., 1 C. P. 559.

The owner of animals must keep them in such a place, and in such a manner that they will not injure other animals. And if he permits a cow, which he knows is accustomed to hook other animals, and it hooks and kills the horse of another person in the highway, while the cow was on the way to her watering place, the owner of the cow will be liable for the value of the horse. *Cogswell v. Baldwin*, 15 Vt. 404. So, where a sucking colt is following its dam, which is led by her owner, in a highway, where it is kicked and killed by a horse which has been turned loose in the highway without a keeper, and where the owner of the colt was exercising reasonable care, he may recover the value of the colt from the owner of the horse, although it was not vicious. *Barnes v. Chapin*, 4 Allen, 444.

ARTICLE III.

DUTIES AND LIABILITIES OF OWNERS OR POSSESSORS OF ANIMALS.

Section 1. Generally, when owner liable. The common law requires the owners of all animals to so keep or restrain them as to prevent them from trespassing upon the lands of other persons. And, if this duty is neglected or disregarded, and his

animals trespass upon the lands of another, an action will lie against the owner for such trespass. *Stafford v. Ingersol*, 3 Hill, 38; *Angus v. Radin*, 2 South. 815; *Dolph v. Ferris*, 7 Watts & S. 367. *Ellis v. Loftus Iron Co.*, L. R., 10 C. P. 10; S. C., 11 Eng. Rep. 214, 229, *n*; *McBride v. Lynd*, 55 Ill. 411; *Pierce v. Hosmer*, 66 Barb. 345.

* But the owner of cattle is not liable in trespass for the damage done by his cattle while in the care and keeping of an agistor who took them to pasture at a specified price. *Ward v. Brown*, 64 Ill. 307; 16 Am. Rep. 561; *Rossell v. Cottom*, 31 Penn. St. 525.

Where an injury is caused by an unavoidable accident, as where a team is frightened and runs away without any fault of the owner, no action lies for the damage done by the team. *Brown v. Collins*, 53 N. H. 442; 16 Am. Rep. 372; *Western Union Telegraph Co. v. Quinn*, 56 Ill. 319; *Shawham v. Clarke*, 24 La. Ann. 390. See *ante*, 160, 161.

§ 2. Injuries to persons by domestic animals. As a general rule the common law does not hold the owner of ordinary domestic animals liable for injuries which they do to the person of another, unless it is shown that the particular animal was accustomed to injure persons, or had an inclination to do so, to the knowledge of the owner. *Earl v. Van Alstine*, 8 Barb. 630; *Smith v. Causey*, 22 Ala. 563; *Dearth v. Baker*, 22 Wis. 73.

But where an animal is accustomed to do injuries to persons, and the owner has notice or knowledge of that fact, he is liable for any injury which such animal may do to another person. *Fairchild v. Bentley*, 30 Barb. 147; *Marsh v. Jones*, 21 Vt. 378; *Arnold v. Norton*, 25 Conn. 92; *Shirfey v. Bartley*, 4 Sneed, 58; *McCaskill v. Elliott*, 5 Strobb. 196; *Laverone v. Mangianti*, 41 Cal. 138; S. C., 10 Am. Rep. 269, 270, *note*.

Where the vicious habit of an animal is directly dangerous, as by kicking or biting by a horse, or biting by a dog, or hooking by a horned animal, the owner, if the habit is known to him, is bound to notify those using, caring for, or dealing with the animal; though the rule is otherwise where the habit is not dangerous, as where a horse has a habit of "pulling" back upon the halter when excited or restless. And if such habit should happen to cause injury to one taking care of the horse, without notice of the habit, no action lies. *Keshan v. Gates*, 2 N. Y. S. C. (T. & C.) 288.

A person may keep a dog for the necessary defense of his

house, garden or fields, and may cautiously use him for that purpose in the *night-time*, but if he permits a mischievous or ferocious dog to be at large on his premises in the *day-time*, he will be liable for the damage done by the dog to a person coming upon the premises, even though such person was a trespasser by hunting in the woods of the dog's owner, and without his license. *Loomis v. Terry*, 17 Wend. 496; *Sarch v. Blackburn*, 4 C. & P. 297; *Brock v. Copeland*, 1 Esp. 203. But in such a case if the person injured is not a trespasser, an action lies, as where a stranger who, without authority from the owner of the premises, enters thereon for a lawful purpose, by invitation of one who is lawfully there by license of the owner. *Kelly v. Tilton*, 2 Abb. Ct. App. 495; 3 Keyes, 263.

If a person provokes or causes a dog to bite him by kicking or other aggressive acts, and not from any mischievous propensity of the dog, no action can be maintained by the party bitten. *Keightlinger v. Egan*, 65 Ill. 235.

Where there is no negligence on the part of the owner or his driver, and a team becomes frightened and runs away and injures a person, no action lies for the damages sustained by the injured party. *Holmes v. Mather*, L. R., 10 Exch. 261; 16 Am. Rep. 384, in note; *Weldon v. Harlem R. R. Co.*, 5 Bosw. 576; *Sullivan v. Scripture*, 3 Allen, 564.

But where the owner or his servant is negligent, and a horse runs away and injures a third person, an action lies against the owner. *McCahill v. Kipp*, 2 E. D. Smith, 413; *Illidge v. Goodwin*, 5 Carr. & P. 190.

A man has a right to keep a dog or any other animal, provided he is kept under restraint, so that persons pursuing their ordinary or lawful avocations are not exposed to danger. *Logue v. Link*, 4 E. D. Smith, 63. No action lies where a child of three years of age is suffered to go unattended into a room where a dog accustomed to bite persons is kept chained in the owner's bedroom, and when the child's parents knew that the dog was accustomed to bite. *Ib.*

§ 3. **Injuries to animals by domestic animals.** There are many cases in which injuries done by one animal to another will give a right of action to the owner of the injured animal against the owner of the animal doing the act which causes the damage. As will be seen in a subsequent place, *post*, 311, § 5, notice or knowledge is in some cases required to be shown before the owner is liable for injuries committed by domestic animals. But

where the animal doing the injury is trespassing upon the lands of the owner of the injured animal at the time when the act is done, it is not necessary to show any notice or knowledge on the part of the owner of the vicious animal, that it was accustomed to do such acts. In such a case the owner is liable for the trespass of his animal, and as a part of the act for all the damage it may do to other animals belonging to the owner of the land so trespassed upon. *Van Leuven v. Lyke*, 1 N. Y. (1 Comst.) 515; *Dunckle v. Kocker*, 11 Barb. 387; *Angus v. Radin*, 2 South. 815; *Dolph v. Ferris*, 7 Watts & Serg. 367.

Where a wire fence separates two lots, and a mare is pastured upon one side, and a stallion upon the other, and the latter kicks and bites the former through such fence, without crossing it, the act is a trespass for which the owner of the stallion is liable, without reference to any question of negligence on the part of the owner of the mare. *Ellis v. Loftus Iron Co.*, L. R., 10 C. P. 10; 11 Eng. Rep. 214; 31 L. T. (N. S.) 483.

An agistor of cattle, who takes a horse to pasture, and places it in a field with a number of heifers, with knowledge that a bull kept on adjacent land had been found in the field, and that there was no sufficient fence to keep him out, is liable if the horse is gored and killed by the bull, although he had no knowledge that the bull was of a mischievous disposition. *Smith v. Cook*, L. R., 1 Q. B. Div. 79. The agistor is liable for the breach of his implied contract to take reasonable care of the horse. *Ib.* See, also, *Phelps v. Paris*, 30 Vt. 511.

§ 4. **Injuries by wild animals.** Where animals are of a tame nature, and not generally accustomed to injure persons or animals, the law does not give damages for injuries of that nature, in the absence of proof that the particular animal was accustomed to do such acts, to the knowledge of the owner. See *post*, 311, § 5. But an entirely different rule prevails in regard to animals of a wild and ferocious nature, which are naturally inclined to acts of violence toward other animals, or to human beings; and in such cases the law does not require any proof that the animal has previously done any mischief or injury to animals or persons, for the owner is presumed to know the habits and disposition which are universal among animals of that species; and, therefore, the owner of wild or ferocious animals, such as lions, tigers, leopards, panthers, bears, wolves and others of a similar nature, is required to keep them securely at all hazards; and if they escape and do any injury to other animals or to persons, the

owner will be responsible for the injury done, without any proof of knowledge of their ferocity, or that he was negligent as to the manner of keeping or securing them.

A man who keeps a bear, which is confined by a chain, which has not evinced any fierceness, but had been comparatively tame and docile in its habits, is, nevertheless, liable for any injury which the animal may do. *Besozzi v. Harris*, 1 F. & F. 92. So a man who keeps a monkey, with a knowledge of its mischievous and ferocious nature, and that it is accustomed to attack and bite mankind, and that it is dangerous to allow it to go at large, is liable for the injuries it may do to persons. *May v. Burdett*, 9 Q. B. 101; 16 id. 64; 10 Jur. 692; 16 L. J., Q. B. 64. To keep wild beasts is not, of itself, an unlawful act, even though they are by nature fierce, dangerous and irreclaimable; but since the propensity of such animals to do dangerous mischief is well known, and is inherent and not to be eradicated by any effort at domestication, nor restrained except by perfect confinement or extraordinary skill and watchfulness, the owner or keeper of such dangerous creatures is required to exercise such a degree of care in regard to them as will absolutely prevent the occurrence of an injury to others through such vicious acts of the animal as he is naturally inclined to commit. *Scribner v. Kelley*, 38 Barb. 14, 16.

But the owner of an elephant, which is being driven along a public highway for a lawful purpose, is not liable for the injury caused by the frightening of a horse which saw the elephant, and ran away in consequence of its fright, unless it is proved that such an effect is produced upon horses in general at the sight of an elephant, and that the owner of the elephant knew or had notice of that fact. *Ib.* In New York there is a general statute relating to the conveyance of animals used in exhibitions, menageries or shows. Laws 1862, ch. 112; 3 R. S. 545, Edm. ed.

§ 5. **Knowledge by owner, of vicious habits.** The owner of animals or creatures which, as a species, are harmless and domesticated, and are kept for convenience or use, is not liable for injuries done by them, unless it is shown that he had notice of such inclination on the part of the particular animals causing the injury to do such acts. *Ante*, 308, § 2.

It is not always practicable to show an actual formal notice, or a positive knowledge by the owner of an animal that it is accustomed to do mischief; and such knowledge is not universally required by the law. Where the owner of a domestic animal

has seen or heard of things relating to the animal which would be sufficient to satisfy a man of ordinary prudence and caution that it is ill disposed and likely to do mischief, it is sufficient to require him to secure the animal in such manner as to prevent injury by it. *McCaskill v. Elliott*, 5 Strobb. (S. C.) 196; *Worth v. Gilling*, L. R., 2 C. P. 1; *Laverone v. Mangianti*, 44 Cal. 138; S. C., 10 Am. Rep. 269; *Partlow v. Haggarty*, 35 Ind. 178.

If a person will keep a mischievous animal, with knowledge of its propensities, he is bound to keep it secure at his peril. *Kelly v. Tilton*, 2 Abb. Ct. App. 495; 3 Keyes, 263.

In an action against the owner of a dog, for causing a team to run away in consequence of an attack by the dog in the street, knowledge by the owner of the dog must be alleged and proved, and it ought to appear clearly that it was the attack of the dog and not any vicious habit of the horse that caused the run-away. *Wormley v. Gregg*, 65 Ill. 251.

It has been held that in an action to recover for an injury caused to a person by the bite of a dog, it must be shown that the owner of the dog knew that he was in the habit of biting mankind, not merely that he bit other animals, or that the action cannot be maintained. *Keightlinger v. Egan*, 65 Ill. 235. But in the same State it has been held that the owner of a mischievous and ferocious dog who permits it to go at large, with a knowledge that it has killed one kind of animals, will be liable if it destroys other animals of a different species. *Pickering v. Orange*, 2 Ill. (1 Scam.) 338. And in an action for an injury done to a horse by a bull, it is competent to show that the owner of the bull knew that the bull had previously attacked a man. *Cockerham v. Nixon*, 11 Ired. (N. C.) 262. So, where the owner of a bull knows that it is viciously disposed toward other animals, he will be liable for injuries inflicted by it upon a person. *Earhart v. Youngblood*, 27 Penn. St. 337.

A person who keeps an animal after he has notice that this particular animal is of a vicious disposition, is required to keep it securely, although it is not of a savage or ferocious species, and he will be liable for such injury as it may do, without reference to any specific negligence as to its custody. *Popplewell v. Pierce*, 10 Cush. 509; *Stumps v. Kelly*, 22 Ill. 140; *Kittredge v. Elliott*, 16 N. H. 77; *Woolf v. Chalker*, 3 N. Y. (3 Comst.) 121; *Koney v. Ward*, 2 Daly, 295; 36 How. 255.

Where a dog has a vicious habit of attacking and biting other dogs, without being incited to do so, to the knowledge of its

owner, and the dog is permitted to run at large, and he attacks and kills the dog of another person which is lawfully in the place where he is killed, the owner of such vicious dog is liable for the damages. *Wheeler v. Brant*, 23 Barb. 324.

Vicious dogs are a nuisance, and their owners must either kill them or confine them, as soon as they have notice of their dangerous habits, or answer in damages for the injuries inflicted by them. *Ib.* Where a dog has bitten persons, to the knowledge of its owner, who afterward suffers him to be at large, he will be liable for the injuries caused by the dog in biting another person afterward. *Buckley v. Leonard*, 4 Denio, 500.

It is not necessary, in order to sustain an action against a person for negligently keeping a ferocious dog, to show that the animal had actually bitten another person before it bit the plaintiff; it is enough to show that it has, to the knowledge of its owner, evinced a savage disposition by attempting to bite. *Worth v. Gilling*, L. R., 2 C. P. 1; *McCaskill v. Elliot*, 5 Strobh. L. 196.

Where the owner of a bull drives it along a public highway, where it injures a person who wears a red handkerchief around his neck, and it is shown that the owner said that he knew that a bull or *the* bull would run at any thing red, it will be sufficient evidence to give the case to the jury on the question of knowledge. *Hudson v. Roberts*, 6 Exch. 697.

An action lies against the owner of a dog, who, knowing the animal to have a propensity for chasing and destroying game, permits it to be at large, and the dog in consequence "breaks and enters" the plaintiff's wood, and chases and destroys young pheasants which are being reared there under domestic hens. *Read v. Edwards*, 17 C. B. (N. S.) 245.

A man who owns a horse which is accustomed to bite persons, to the knowledge of the owner, who usually keeps him muzzled, is liable for injuries committed by the animal by biting a person who was passing by it upon a sidewalk in a public street, even though he knew the horse would bite, and was usually muzzled, but did not notice that it was not then muzzled. *Koney v. Ward*, 2 Daly, 295; 36 How. 255. So one who negligently permits his horse to run loose and unattended upon the sidewalks of a populous street in a city, will be liable for any injury it may do by kicking a person who is lawfully passing along a sidewalk of such street; and it is not necessary to show viciousness in the horse in committing the injury, except in cases where, but for

the vice of the animal, the owner would be free from fault. *Dickson v. McCoy*, 39 N. Y. (12 Tiff.) 400 ; 7 Trans. App. 111 ; *Goodman v. Gay*, 15 Penn. St. 188. And see *Barnes v. Chapin*, 4 Allen, 444.

The general rule, that the owner of a domestic animal is not liable for injuries done by it to other animals, or to persons, seems to be generally recognized and acted upon.

In some cases it is held that a single act of injury done by the animal to the knowledge of the owner is sufficient to render him liable for subsequent similar injuries done by the animal. *Smith v. Pelah*, 2 Strange, 1264 ; *Arnold v. Norton*, 25 Conn. 92 ; *Kittridge v. Elliott*, 16 N. H. 77.

In other cases two or more instances were shown. *Buckley v. Leonard*, 4 Denio, 500 ; *Wheeler v. Brant*, 23 Barb. 324.

But there are cases in which the law ought not to require proof that a particular animal has done a previous similar injury before its owner is liable for its acts.

It has been seen, *ante*, 310, that the owner of wild and ferocious animals is liable for the injuries done by them to other animals or to persons, without proof of knowledge that they had committed previous injuries. And the same principle ought to govern where a man keeps an animal which he knows to be of a savage and ferocious nature, and liable at any time to do some injury to other animals or to persons. In such cases, the owner ought to be regarded as having sufficient knowledge or notice to require him to prevent the animal from doing mischief. And it has been held that a man who keeps a large and fierce-looking dog, which is in the habit of running out to the highway and furiously barking at persons passing along, and of sometimes attacking persons or horses passing in the highway, will be liable if the dog bites a person, although it is not shown that it had previously bitten any person ; and the court said: "That a dog has once bitten a man, is a circumstance from which the probability of its biting another may be inferred ; but the same inference may be drawn with equal confidence from other indications of the dog's disposition. Indeed, attempts before made by a dog that had never succeeded in actually biting, may give more full assurance of danger to be apprehended from it, than could exist as to another dog, that under some peculiar circumstances had used its teeth upon man. To require that a plaintiff, before he can have redress for being bitten, should show that some other sufferer had previously endured harm from

the same dog, would be always to leave the first wrong undressed, and to lose sight of the thing to be proved, in attention to one of the means of proof. If nothing short of a dog's once having bitten can show its dangerous nature, even the owner of a dog known to have been bit by a rabid animal may not be answerable, unless on some previous occasion the dog has inflicted the dreadful injury, which he was bound to have apprehended and prevented." *McCaskill v. Elliott*, 5 Strohh. (S. C.) 197, 198. In *Worth v. Gilling*, L. R., 2 C. P. 4, the court said: "Although there was no evidence that the dog had ever before bitten any one, it was proved that he uniformly made every effort in his power to get at any stranger who passed by, and was only restrained by the chain. There was abundant evidence to show that the defendants were aware of the animal's ferocity, and, if so, they are clearly responsible for the damage the plaintiff has sustained. * * * There was evidence that the dog was in the habit of jumping at every one who passed his kennel, endeavoring to bite, and that the defendants knew it. It is true that he did not appear to have succeeded in biting any person until he unfortunately caught the plaintiff. The defendants admitted that the dog was purchased for the protection of their premises. Unless of a fierce nature, he would hardly have been useful for that purpose." See, also, *Laverone v. Mangianti*, 41 Cal. 138; S. C., 10 Am. Rep. 269; *Jackson v. Smithson*, 15 M. & W. 561; *Oakes v. Spaulding*, 40 Vt. 347; *Brown v. Carpenter*, 26 id. 638.

Although, in an action for injuries resulting from the bite of a dog, notice to the wife of the savage nature of the dog will be sufficient evidence of the scienter to fix the husband; yet the converse does not hold, and a notice to the husband will not, taken alone, be sufficient proof of the scienter to render the wife liable after her husband's death. *Miller v. Kimbray*, 18 L. T. (N. S.) 360. But a husband will be held to have sufficient knowledge of the propensity of his dog to bite, where it is shown that the wife of the defendant, a milkman, occasionally attended to his business, which was carried on upon premises where he kept the dog, and that a person had gone there and made a formal complaint to the wife, for the purpose of having it communicated to the husband that the dog had bitten the informant's nephew. *Gladman v. Johnson*, 36 L. J. (C. P.) 153; 15 W. R. 313; 15 L. T. (N. S.) 476.

§ 6. **Agent's knowledge of viciousness.** Knowledge by the agent is generally regarded as knowledge by the principal. *Ante*, 231, 232. And, therefore, if the owner of a dog appoints a servant to keep it, the servant's knowledge of the dog's ferocity is the knowledge of his master. *Baldwin v. Casella*, L. R., 7 Exch. 325; S. C., 3 Eng. Rep. 434. So the owner of a dog was held to have sufficient knowledge of the ferocity of his dog, where it was shown that before it bit the plaintiff, two persons who had been attacked by it on previous occasions, proved that they had gone to the defendant's public house and made complaint to two persons who were behind the bar serving customers, and that one of them also complained to the barmaid; but there was no evidence that these complaints were communicated to the defendant, nor that the two men spoken to had the general management of the defendant's business, or had the care of the dog. *Applebee v. Percy*, L. R., 9 C. P. 647; 22 W. R. 704; 43 L. J. (C. P.) 365; 30 L. T. (N. S.) 785.

§ 7. **Liability of possessor of animal.** It is not merely the owners of dogs or other animals who are liable for their acts; for in an action against a person for keeping a dog accustomed to bite mankind, it is not essential that the dog should be his; for if he harbors the dog, or allows it to be at his premises, or to resort to them, he will be as liable as though owner of the dog. *McKone v. Wood*, 5 Carr. & P. 1; *Frammell v. Little*, 16 Ind. 251; *Wilkinson v. Parrott*, 32 Cal. 102; *Marsh v. Jones*, 21 Vt. 378.

But a person is not liable for the acts of a dog which he strives to drive away from his premises. And where it appeared that the plaintiff was bitten by a stray dog at a railway station while she was waiting for a train; and it was further shown that at 9 P. M. the dog flew at and tore the dress of another female on the platform; that at 10:30 P. M. he attacked a cat in the signal-box near the station, when the porter then kicked him out, and saw no more of him; and that he made his appearance again at 10:40, on the platform, where he bit the plaintiff; this was held not sufficient to show that the company were guilty of negligence in not keeping the station reasonably safe for passengers. *Smith v. Great Eastern Railway Co.*, L. R., 2 C. P. 4; 36 L. J. (C. P.) 22; 15 W. R. 131; 15 L. T. (N. S.) 246.

§ 8. **Injuries by trespassing animals.** This subject has already been noticed, *ante*, 307, § 1; *ante*, 309, § 3. And while the owner is liable for the trespasses of his cattle, he is not liable for the injuries done by the cattle of another person, although such

cattle entered through the breach of fence made by the cattle of the former, unless the acts occurred in a manner to be under his control. *Durham v. Goodwin*, 54 Ill. 469.

But if the beast (a mule) of the defendant escapes from his field through an insufficient fence into the field of A, thence into the field of B, and thence into the field of the plaintiff, where it injures the plaintiff's horse, the defendant will be liable for the injuries, although, as between him and A, the latter was bound to keep the fence between their fields in repair, although the fence between the plaintiff's field and B's was insufficient, and although the defendant did not know that the mule was vicious. *Lyons v. Merrick*, 105 Mass. 71. See *Stafford v. Ingersol*, 3 Hill, 38.

But, where two persons own adjoining lands, and there is a division fence erected between them, and the cattle of one of them enters upon the lands of the other, who has neglected to keep his portion of the division fence in repair, he cannot maintain an action for the entry of such cattle through the defective fence. *Cowles v. Balzer*, 47 Barb. 562.

And, where M., upon whose land there is an unguarded "slough-well," and C., an adjoining land-owner, mutually agree, for the purpose of saving the expense of fence building, that the stock of each might, in the fall of the year, pasture upon the lands of the other, but with no stipulation on the part of either to protect the cattle of the other while pasturing on his lands, this will not render M. liable for the loss of C.'s horse in the "slough-well." *McGill v. Compton*, 66 Ill. 327. So the owner of uninclosed woodland is not liable for an injury sustained by trespassing cattle which fall into a hole dug by the owner in such woodland, which he leaves uninclosed. *Knight v. Abert*, 6 Penn. St. 472; and see *Bush v. Brainard*, 1 Cow. 78; *ante*, 305, § 4; *Mentges v. N. Y. & Harlem R. R. Co.*, 1 Hilt. 425.

§ 9. Communicating diseases. The right of a person to keep diseased animals upon his own premises has been noticed, *ante*, 306, § 7. But the law does not look with favor upon the acts of those who intentionally, or by negligence, cause the spread of contagious or infectious diseases among animals. And a person who sells an animal with a warranty that it is free from foot or mouth disease, when it has such a disease, which is communicated to other animals by putting it in the same herd with them, will be liable for the loss of such animal if it dies of the disease,

as well as for the loss of all of the other cattle to which it communicated the disease. *Smith v. Green*, L. R., 1 C. P. Div. 92; *Mullett v. Mason*, L. R., 1 C. P. 559.

When the owner of an animal takes it to a public market for sale, this furnishes evidence of a representation on his part that the animal is not, so far as he knows, suffering from any infectious disease. *Bedger v. Nicolls*, 28 L. T. (N. S.) 441, Q. B. One who knowingly delivers a glandered horse to another person without informing him that the horse is glandered, and the latter, not knowing of such disease, puts it with another horse of his, which takes the disease and dies of it, is liable to an action without any allegation of fraud or warranty. *Penton v. Murdock*, 22 L. T. (N. S.) 371; 18 W. R. 382.

So, where a flock of sheep is sold by an agent authorized to sell them, which he does, with a knowledge that the sheep are diseased with a contagious disease, but does not communicate that fact to the purchaser, who mixes the sheep with a flock before owned by him, in consequence of which some of the sheep of both flocks die, the principal will be liable for the loss of the sheep, although he had no notice of the agent's fraud. *Jeffrey v. Bigelow*, 13 Wend. 518.

§ 10. **Injuries by animals of different owners.** Where several animals belonging to different owners join in the commission of mischief, the several owners cannot, at common law, be joined in a single action for the mischief done, since each person is not jointly liable for the acts of all the animals, but merely for the acts of the animal owned by him. *Carroll v. Weiler*, 4 Y. N. S. C. (T. & C.) 131; S. C., 1 Hun, 605; *Van Steenburgh v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Denio, 495; *Partenheimer v. Van Order*, 20 Barb. 479; *Russell v. Tomlinson*, 2 Conn. 206; *Adams v. Hall*, 2 Vt. 9; *Denny v. Correll*, 9 Ind. 72. The question what portion of the damage was done by each animal is one of fact; and where cows trespass and do damage, and in the absence of all proof as to the amount of damage done by each cow, the law will infer that each did an equal amount of the damage. *Partenheimer v. Van Order*, 20 Barb. 479; *Buddington v. Shearer*, 20 Pick. 477. If the animals are of unequal size and strength, and have different capacities for mischief, this may be taken into the account in estimating the liabilities of the owners. Where two dogs of unequal size are owned by different persons, and the dogs together kill a number of sheep, the jury may find that the larger dog did more mischief or damage

than the smaller one, and apportion the damages accordingly. *Wilbur v. Hubbard*, 35 Barb. 303. Where growing crops are destroyed by repeated trespasses of cattle belonging to two different owners, and it is impossible to distinguish between the trespass of one lot of cattle and that of the other, or to determine the actual amount of damage done by either separately, the damages may be apportioned by charging each owner according to the number of cattle owned by him and thus doing damage. *Powers v. Kindt*, 13 Kans. 74.

Joint-owners of a vicious animal are both equally bound to restrain him, and if the animal is not restrained, and one of the joint-owners is sued and compelled to pay for injuries done by such animal, no action lies by him against the other joint-owner for contribution, since both parties were wrong-doers, and in that case the law will not enforce contribution. *Spaulding v. Oakes*, 42 Vt. 343.

§ 11. **Liability by statute.** The liabilities of owners of domestic animals for injuries done by them in public streets or highways has been noticed, *ante*, 313, 314. In New York it is not lawful for cattle, horses, sheep, swine or goats to run at large in public streets, parks or highways. Laws 1869, ch. 424, § 1. And if a horse is permitted to run at large in the highway the owner will be liable to any person who is injured by it in such highway, without any proof of knowledge by the owner that the animal was accustomed to do such acts. *Bowyer v. Burley*, 3 N. Y. S. C. (T. & C.) 362.

"The owner or possessor of any dog that shall kill or wound any sheep or lamb shall be liable for the value of such sheep or lamb to the owner thereof, without proving notice to the owner or possessor of such dog, or knowledge by him that his dog was mischievous or disposed to kill sheep." 1 R. S. 656, § 9, Edm. ed.; *Fish v. Skut*, 21 Barb. 333; *Osincup v. Nichols*, 49 id. 145.

Where the injury to sheep or lambs is other than that specified in the statute it must be shown that the owner of the dog knew that it was accustomed to do the kind of mischief complained of. And while the owner of a dog is liable if it kills or wounds a sheep or lamb, without proof of knowledge, the rule is otherwise where the injury alleged is that of chasing and worrying sheep; and in such case a scienter must be shown to render the owner of the dog liable. *Auchmuty v. Ham*, 1 Denio, 495;

There are statutes in several of the States relating to injuries done by dogs to sheep and other animals, and the statutes and

authorities of such States must be consulted for the laws of such States.

§ 12. **Contributory negligence.** In a subsequent portion of this work this subject will be fully considered, and, therefore, a mere reference to that title will be sufficient in this place. And see *ante*, 36, 146, and *ante*, 309.

ARTICLE IV.

RIGHTS OF THIRD PERSONS.

Section 1. To kill dangerous animals. Any person may lawfully kill a ferocious dog which is accustomed to attack and bite mankind, where it is found at large on public highways or streets, without a muzzle or other means of preventing it from injuring persons. *Putnam v. Payne*, 13 Johns. 312; *Maxwell v. Palmerton*, 21 Wend. 407; *Brown v. Carpenter*, 26 Vt. 638; *Woolf v. Chalker*, 31 Conn. 121, 130.

But, where one keeps a dog for the protection of his family, and the dog is duly licensed, and collared, according to the statute, and so confined as not to endanger persons properly upon the owner's premises, it cannot lawfully be killed by one who enters upon the premises, even though it was a dangerous animal and accustomed to bite those who came near it. *Uhlein v. Cromack*, 109 Mass. 273.

Nor can a person lawfully enter a dwelling-house for the purpose of killing a dog not registered and collared according to the statute. *Bishop v. Fahay*, 15 Gray, 61; *Kerr v. Seaver*, 11 Allen, 151.

§ 2. **Abating a nuisance.** An inhabitant of a dwelling-house may lawfully kill a dog which is in the habit of haunting his house and barking and howling by day and by night, so as to disturb the peace and quiet of his family, if the dog cannot otherwise be prevented from annoying him. *Brill v. Flagler*, 23 Wend. 354. A wanton destruction of the animal is not justifiable. *Ib.*

§ 3. **To protect his own animals.** Every owner of animals has a right to protect them from being unlawfully attacked or destroyed by other animals; and if he cannot otherwise protect his own than by killing the attacking animal, he may kill it. When a dog goes upon the land of a person not its owner, and there chases fowls, and is in the act of destroying one, the owner of

the fowl may lawfully kill the dog. *Leonard v. Wilkins*, 9 Johns. 233; *Hinckley v. Emerson*, 4 Cow. 351.

A dog which is in the act of chasing and worrying sheep may be lawfully killed by the owner of the sheep. *Brown v. Hoburger*, 52 Barb. 15.

If the owner of an ass knows that he is a dangerous animal, and is in the habit of pursuing and injuring stock, and he permits it to run at large, when he attacks a cow, throws her down, and is in the act of stamping on her, the owner of the cow will be justified in killing the ass if he believes that to be necessary to save his cow. *Williams v. Dixon*, 65 N. C. 416.

If a statute provides that no person shall, in any way, destroy any mink between specified dates, under a prescribed penalty; and the State constitution declares that all men have certain natural, essential and inherent rights, among which is the right of "protecting property," and an action is brought against a person for killing minks contrary to the statute, it will be a good defense to show that the defendant shot the minks upon his own land while they were chasing his geese, and without showing that the geese were in imminent danger and could not otherwise have been protected. *Aldrich v. Wright*, 53 N. H. 398; S. C., 16 Am. Rep. 339, where the cases are fully and ably reviewed.

§ 4. To protect his property from trespass. It has been seen that domestic animals cannot lawfully be killed for a mere trespass upon the lands of another. *Ante*, 304, § 4. If animals are trespassing, as by going upon a railroad track, and are there killed by a passing train, no action lies. *Ante*, 303, § 4. So, too, there are cases in which trespassing animals may be lawfully killed. And where the case showed that a trespassing dog had taken fish from the wall of the owner's house, where they had been hung up to dry, and a few hours afterward the dog was found trespassing on the same premises, it was held that the owner of the premises had a right to protect his property by killing the dog if that was necessary. *King v. Kline*, 6 Penn. St. 318. And see *Bradford v. McKibbin*, 4 Bush (Ky.), 545.

A dog may lawfully drive trespassing stock off of his master's premises; and if he does so, the owner of the stock will be liable to an action for killing the dog, unless it is shown that he is a nuisance in the neighborhood. *Spray v. Ammerman*, 66 Ill. 309.

If domestic animals trespass upon the lands of a person other than the owner, he may lawfully turn them off of his land by

driving them into a public highway and leaving them there. *Humphrey v. Douglass*, 10 Vt. 71. So if horses escape from their owner's inclosure, by reason of his neglect to keep up his portion of a division fence, the horses may be turned into the highway by the person upon whose lands they are trespassing. *Humphrey v. Douglass*, 11 Vt. 22. But if horses or cattle come upon the lands of a person in consequence of his neglect to keep up his part of a division fence, he cannot turn them into the highway if they belong to the adjoining land-owner, and went through such portion of the defective fence. *Knour v. Wagoner*, 16 Ind. 414; *Clark v. Adams*, 18 Vt. 425. In such cases he ought to drive them back upon their owner's land. *Ib.*

One may drive trespassing cattle off of his land by using a dog for that purpose, if the dog is a proper one to use for that purpose, and care is used to prevent excessive worrying or injury. *Davis v. Campbell*, 23 Vt. 236; *Clarke v. Adams*, 18 id. 425; *Wood v. La Rue*, 9 Mich. 158.

If a person chases a horse out of his field with a very large and fierce dog, he will be liable for the injuries thus done. *Amick v. O'Hara*, 6 Blackf. 258. See *ante*, 305, § 5.

CHAPTER XI.

ANNUITIES.

ARTICLE I.

GENERAL RULES RELATING TO ANNUITIES.

Section 1. Nature of an annuity. Lord COKE defines an annuity to be a yearly sum stipulated to be paid to another, in fee, or for life, or years, and chargeable only on the person of the grantor. Co. Litt. 144, *b*. It has also been defined as a sum of money payable by contract at fixed regularly recurring epochs, which are usually determined by reference to the civil year, although the intervals between them need not be in every case years; they may either be greater or less than a year. It is chargeable only upon the person of the grantor. 2 Broom & Had. Com. 54 (Wait's ed., vol. 1, 459); and see *Shufeldt v. Abernethy*, 12 N. Y. Leg. Obs. 173, 182; S. C., 2 Duer, 533; ——— v. ———, 5 Mart. (La.) 312.

An annuity is sometimes confounded with a rent-charge, from which it differs, however, in being chargeable only upon the *person* of the grantor, while a rent-charge is something which always issues out of specific land. Bac. Abr., *Annuity*, A; *Horton v. Cook*, 10 Watts (Penn.), 127.

An annuity in fee is personal estate *sub modo*. It has none of the incidents and characteristics of real estate, except that of descending to the heir, and not forming assets in the hands of the executor. The husband is not entitled to his curtesy, nor the wife to her dower, in an annuity. It cannot be conveyed by way of use, and it is not within the statute of frauds, and may be bequeathed and assigned as personal estate. 3 Kent's Com. 460, *n.*; *Aubin v. Daly*, 4 Barn. & Ald. 59; and see 2 Broom & Had. Com. 54, 55 (Wait's ed., vol. 1, 459).

There is a distinction between an *income* and an *annuity*. The former embraces only the net profits after deducting all necessary expenses and charges; the latter is a fixed amount directed to be paid absolutely and without contingency. *Booth v. Ammerman*, 4 Bradf. (N. Y.) 129, 134; *Ex parte M Comb*, id. 151, 152.

Though not belonging to the class of things real, an annuity may, in a limited sense, be described as a hereditament, because the law permits it to be limited to a man and his heirs, or to a man and the heirs of his body, so that it in that case descends, upon death and intestacy, to the person who would succeed to land limited in the same manner, and it is forfeitable for treason; and, moreover, like incorporeal hereditaments strictly so-called, it can only be granted or transferred by deed, though the contract to grant an annuity will be binding and enforced against the estate of the proposed grantor. See 2 Broom & Had. Com. 55 (Wait's ed., vol. 1, 459); *Nield v. Smith*, 14 Ves. 491.

The term "annuity" is sometimes applied, in a very general sense, to a yearly or stated payment of money. See *Horton v. Cook*, 10 Watts (Penn.), 127.

§ 2. **How created.** An annuity may be created by deed or by will; and a devise, in the following words: "I give and bequeath to my daughter A the sum of sixty dollars as an annuity, to be paid to her out of the profits of my real estate annually," creates an annuity and not a rent-charge. *Robinson v. Townsend*, 3 Gill. & Johns. (Md.) 413.

Money lent and paid at different times for the education and advancement of the defendant is held a good consideration for the grant of an annuity (*Kelf v. Ambrose*, 7 Term. R. 551); and a covenant by a husband to secure his wife an annuity during her life, in case she should survive him, is a sufficient consideration for a grant of an annuity from her father. *Ex parte Draycott*, 2 Glyn. & J. 283. But past seduction and cohabitation are not a good consideration to support an annuity. *Beaumont v. Reeve*, 8 Q. B. 483; S. C., 15 L. J. (Q. B.) 141; 10 Jur. 284. A promise to pay an annuity in consideration of forbearance to sue the personal representatives of the grantor is binding, and may be enforced against the promisor. *Horton v. Cook*, 10 Watts (Penn.), 124.

Annuities given by will, though payable out of the personal estate or general funds of the testator, are generally governed by the principles applicable to a devise of real estate. *Bradhurst v. Bradhurst*, 1 Paige, 331. The limitation, in a will, of an annuity, to take effect upon the death of the first devisee, without issue living at his death, is good; and the first devisee takes a perpetuity, subject to be defeated by the happening of the contingency, and when the limitation over becomes impossible, his right to the annuity becomes absolute. *Ib.*

A daughter who owned real estate, subject to a life estate in her mother, who lived with her upon the land, by her will directed her executors to lease "all her real estate" not before devised, and out of the profits to pay her mother an annuity for life. It was held that the acceptance, by the mother, of the annuity under the will was not inconsistent with her claim to the life estate, and that she was entitled to both. *Harrington v. Cannon*, 1 Paige, 569. Where a sum of money was secured by bond to a widow, in consideration of her relinquishing her right of dower, payable on a certain day yearly during her life, it was held that this was an annuity not subject to apportionment. *Tracy v. Strong*, 2 Conn. 659.

§ 3. **Payment of.** When the time of payment is distinctly stated, the annuity must of course be paid at that time. But in the absence of any particular instructions it is payable at the end of the year. *Hall v. Hall*, 2 McCord's Ch. (S. C.) 281; *Booth v. Ammerman*, 4 Bradf. (N. Y.) 129. An annuity left to the wife, payable "annually, or in any way she may wish," was ordered to be paid quarterly in advance. *Hall v. Hall*, 2 McCord's Ch. (S. C.) 281. So where an annuity was given by will to the wife of the testator, payable on the first of March, and the testator died in August, it was held that the annuitant was entitled to the full annuity on the first day of the following March. *McLemore v. Goode*, 1 Harp. Ch. (S. C.) 272. And where a testator died in September, having bequeathed "a five hundred dollars' annuity," to be paid "on the first day of March in every year," it was held that upon the first day of March following the testator's death, the annuitant was entitled to a part of the annuity proportioned to the time elapsed after the testator's death. *Waring v. Purcell*, 1 Hill's Ch. (S. C.) 193.

An annuity given by a will for the life of the annuitant, to be paid by the executors quarterly, but not charged upon the income merely, is valid. *Galt v. Cook*, 7 Paige, 521.

§ 4. **Enforcement of.** To enforce the payment of an annuity, an action of annuity lay at common law, or the remedy was by distress, according as the person or the lands of the grantor were sought to be affected. The action of annuity has long been out of use, being superseded by the action of debt or covenant. See 1 Tidd's Pr. 3, 4; Co. Litt. 144, b. After judgment has been rendered in an action of debt on a bond to secure the payment of an annuity, a *scire facias* is not requisite to warrant an execution for subsequent arrears. *Wood v. Wood*, 3 Wend. (N. Y.) 454; Bac. Abr., *Annuity*, C. An action will lie for an annuity

granted by the defendant to the plaintiff in consideration of faithful services for life. *Hope v. Coleman*, 2 Wils. 221.

A bill in equity will lie to enforce payment of an annuity charged upon land. *Townshend v. Duncan*, 2 Bland. (Md.) 45. In a suit in equity for arrears of an annuity, the decree should not only be for the sums already due and interest from the times at which they were payable, but should reserve liberty to apply to the court, from time to time, to extend its decree so as to embrace sums afterward becoming payable. *Marshall v. Thompson*, 2 Munf. (Va.) 412; *Webb v. Jiggs*, 4 Maule & Selw. 113.

§ 5. **How determined.** When an annuity is secured by bond, the death of the annuitant before the day of payment defeats the annuity. *Manning v. Randolph*, 4 N. J. L. (1 South.) 144. And where a person who has an annuity charged upon certain real estate, inherits one-half of such estate as the heir at law of the devisee of the grantor of the annuity, one-half of such annuity becomes merged by the descent thus cast upon him. *Jenkins v. Van Schaack*, 3 Paige, 242.

Upon a bequest to the testator's wife of an annuity "during her widowhood and life," it was held, that the testator evidently intended it should cease upon her second marriage, but that such intention being "*in terrorem*," and against the policy of the law, as in restraint of marriage, could not take effect; and that the widow was entitled to the annuity during her life notwithstanding her second marriage, the same not being expressly devised over, except to the residuary legatee, who was heir at law to the testator. *Parsons v. Winslow*, 6 Mass. 169.

Where an annuity bond is in the penal sum of \$1,000, conditioned to pay \$100 yearly during the obligee's life, the payment for ten years is no bar to the obligee's further claim during his life. *Blackmer v. Blackmer*, 5 Vt. 355. Where the obligor's estate is represented insolvent, in such case, the commissioners should allow, on the bond, only what was due at the time of the obligor's death. Whatever subsequently becomes due may be collected of the obligor's heirs, if they have assets. *Id.*

Under a provision that an annuity should cease if a lady should associate, continue to keep company with, or cohabit, or criminally correspond with one F., it was held, that all intercourse whatever, though the most innocent, is within the terms of the deed. *Dormer v. Knight*, 1 Taunt. 417.

An annuity may be purchased, like other property, and inequality of price will not, of itself, make the contract usurious. *Lloyd v. Scott*, 4 Pet. (U. S.) 205.

CHAPTER XII.

APPLICATION OF PURCHASE-MONEY.

TITLE I.

GENERAL RULES RELATING TO THE APPLICATION OF PURCHASE-MONEY.

ARTICLE I.

PURCHASER, IN WHAT CASES BOUND TO SEE TO THE APPLICATION OF.

Section 1. General rule as to. The general rule on this subject is briefly stated to be, that where the *trust* or *charge* is of a defined and limited nature, the purchaser must see to the application of the purchase-money; otherwise, when it is general and unlimited. *Duffy v. Calvert*, 6 Gill. 487; *St. Mary's Church v. Stockton*, 4 Halst. Ch. (N. J.) 520; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566. See *Stronghill v. Anstey*, 1 De G., M. & G. 635. To impose on a purchaser the duty of seeing to the application of the purchase-money, the trust must be of such a nature that the purchaser would reasonably be expected to see to the application of the purchase-money. Such will be the case where land is charged with the payment of particular debts; but if not specified he is not bound. *Sims v. Lively*, 14 B. Monr. (Ky.) 348.

§ 2. **Where the trust is specific.** In the application of the rule above stated, it has been generally held that where the trust is created, or the charge is imposed, for the payment of a portion, a mortgage, legacies, or scheduled debts, which are definitely ascertained, and to be paid over immediately to the person entitled, the purchaser, in the view of a court of equity, is bound to see that the money is actually applied to their discharge before the estate is relieved from the burden. *Swasey v. Little*, 7 Pick. (Mass.) 296; *Bugbee v. Sargent*, 23 Me. 269; *Long v. Long*, 1 Watts (Penn.), 267; *Hoover v. Hoover*, 5 Barr (Penn.), 351; *Dowman v. Rust*, 6 Rand. (Va.) 587; *Leavitt v. Wooster*, 14 N. H. 550. See *Stronghill v. Anstey*, 1 De G., M. & G. 653.

§ 3. Where the trust is general and indefinite. But where the trust is created or the charge exists for the payment of debts generally, or for the payment of debts and legacies, when an account of the debts necessarily precedes the payment of the legacies; or where the money is to be reinvested or otherwise applied by the trustee to purposes which require time, deliberation, and discretion on his part, the purchaser is relieved from such responsibility, and the *cestuis que trust* must look alone to the trustee. *Laurens v. Lucas*, 6 Rich. Eq. (S. C.) 217; *Gardner v. Gardner*, 3 Mason, 178; *Andrews v. Sparhawk*, 13 Pick. 393; *Cadbury v. Duval*, 10 Barr (Penn.), 265; *Grant v. Hook*, 13 Serg. & R. (Penn.) 259; *Potter v. Gardner*, 12 Wheat. (U. S.) 198; *Williams v. Otey*, 8 Humph. (Tenn.) 568; *Clyde v. Simpson*, 4 Ohio St. 445; *Robinson v. Lowater*, 5 De G., M. & G. 272; S. C., 17 Beav. 592; *Lining v. Peyton*, 2 Desauss. (S. C.) 375; *Redheimer v. Pyson*, 1 Spear (S. C.), 135.

§ 4. Collusion or fraud of purchaser. All personal property is bound for the payment of debts, and a purchaser is not bound to know whether there are debts or not, nor is he bound to see to the application of the purchase-money. *Keane v. Roberts*, 4 Mad. 356. Thus an executor has power to sell personal assets of his testator, and even chattels specifically devised; and the purchaser has no concern with the purchase-money. *McLeod v. Drummond*, 17 Ves. 160; see *Field v. Schieffelin*, 7 Johns. Ch. 150. If, however, there be fraud and collusion in the transaction, as where the chattel is sold for a nominal price only, or at a fraudulent undervalue. *Ewer v. Corbet*, 2 P. Wms. 149; or, if the purchaser receives the chattel in payment of the executor's own debt to him, *Wilson v. Doster*, 7 Ired. (N. C.) Eq. 231; *Dodson v. Simpson*, 2 Rand. (Va.) 294; or if he knows that the executor intends to misapply the money, and the sale is made for that purpose; *Sacia v. Berthoud*, 17 Barb. 15; *Railway Co. v. Barker*, 29 Penn. St. 160; *Garrard v. Railroad Co.*, id. 154; *Miller v. Williamson*, 5 Md. 219. In all these, and the like cases of collusion and fraud between the executor and purchaser, the latter cannot protect himself under the absolute power of the former to sell. See *Williams v. Branch Bank*, 7 Ala. 906; *Williamson v. Morton*, 2 Md. (Ch.) 94; *Elliott v. Merryman*, Barn. 81; 1 White's Eq. Lead. Cas. 40 (58); *Field v. Schieffelin*, 7 Johns. Ch. 150. For although the purchaser will take a good title at law, equity will convert him into a trustee, and make him accountable to the creditors or *cestuis que trust*. *D'Oyley*

v. *Loveland*, 1 Strobb. L. (S. C.) 46; Perry on Trusts, § 598. It has been said, that in the United States the English doctrine, in regard to the application of the purchase-money, has rarely been administered except in cases of fraud in which the purchaser was a coadjutor, the general rule here being, that the purchaser, who in good faith pays the purchase-money to the person authorized to sell, is not bound to look to its application, and that there is no difference in this respect between lands charged in the hands of an heir or devisee with the payment of debts, and lands devised to a trustee to be sold for that purpose. 1 Cruise's Dig., tit. 12, c. 4, § 36, note; and see *Champlin v. Haight*, 10 Paige, 275; *Duffy v. Calvert*, 6 Gill, 48; *Cryden's Appeal*, 1 Jones (N. C.), 72; *Garnett v. Macon*, 6 Call (Va.), 309, 354.

§ 5. **Purchaser of real estate.** One of the English rules laid down in the leading case on the subject is, that if the trust directs lands to be sold for the payment of certain debts, mentioning in particular to whom those debts are owing, the purchaser is bound to see that the money is applied for the payment of those debts. *Elliott v. Merryman*, Barn. 78; 1 White's Eq. Lead. Cas. 40 (58); and see *M'Leod v. Drummond*, 17 Ves. 162; *Horn v. Horn*, 2 Sim. & Stu. 448. This rule is not favored in all its strictness by the American courts (see 3 Redf. on Wills, 235; *Stronghill v. Anstey*, 1 DeG., M. & G. 653, note), although they apply the doctrine in those cases where it would seem to be unavoidable. *Rutledge v. Smith*, 1 Busb. Eq. (N. C.) 283; *Dalzell v. Crawford*, 1 Pars. Eq. (Penn.) 57. But in cases where the devise is for the payment of debts generally, and also for the payment of legacies, the trust becomes a mixed one, and the purchaser is not bound to see to the application of the purchase-money, because to hold him liable to see the legacies paid would, in fact, involve him in the necessity of taking an account of all the debts and assets. *Andrews v. Sparhawk*, 13 Pick. 393; *Sims v. Lively*, 14 B. Monr. (Ky.) 435; *Goodrich v. Proctor*, 1 Gray, 567. So, it is well settled, that a purchase under a decree of a court has no concern with the disposition which the court may make of the purchase-money, nor can his right as a purchaser be affected by any misapplication which he may make of it. *Wilson v. Davisson*, 2 Rob. (Va.) 385; *Coombs v. Jordon*, 3 Bland, 284; 1 Lead. Cas. Eq. 76.

Where there is a devise of real estate for the payment of debts generally, or the testator charges his debts generally upon his

real estate, and the money is raised by the trustee by sale or mortgage, it is universally agreed, that the same rule applies as in cases of *personalty*; namely, that the purchaser or mortgagee is not bound to look to the application of the purchase-money. *Gardner v. Gardner*, 3 Mason, 178, 218; *Wormley v. Wormley*, 8 Wheat. (U. S.) 421, 422; *Greetham v. Colton*, 34 Beav. 615; *Robinson v. Lowater*, 5 De G., M. & G. 272; 1 Lead. Cas. Eq. (59), 74. Always subject, however, to the exception, that if the purchaser or mortgagee is knowingly a party to any breach of trust, by the sale or mortgage, it shall afford him no protection. *Garnett v. Macon*, 6 Call (Va.), 308; *Potter v. Gardner*, 12 Wheat. (U. S.) 498; *Eland v. Eland*, 4 M. & Cr. 427.

§ 6. Where discretion is to be exercised by trustee. Where the trust is defined in its object, and the purchase-money is to be reinvested upon trusts which require time and discretion, or the acts of sale and reinvestment are manifestly contemplated to be at a distance from each other, it seems that the purchaser is not bound to look to the application of the purchase-money. For the *trustee* is clothed with a *discretion* in the management of the trust fund, and if any persons are to suffer by his misconduct, it should be rather those who have reposed confidence, than those who have bought under an apparently authorized act. See *Wormley v. Wormley*, 5 Wheat. (U. S.) 421, 442; *Parker v. Clarkson*, 4 W. Va. 407; *Locke v. Lomas*, 5 De G. & Sm. 326; *Redheimer v. Peyson*, 1 Spear's Eq. (S. C.) 135; *Lining v. Peyton*, 2 Desaus. (S. C.) 375; *Coonrod v. Coonrod*, 6 Hamm. 114; *Hauser v. Shore*, 5 Ired. Eq. (N. C.) 357; *Sims v. Lively*, 14 B. Monr. (Ky.) 348.

§ 7. Where the testator reposes the trust of applying the money in the trustee. In a late case in England, the Lord Chancellor observed, "that if a trust be created for the payment of debts and legacies, the purchaser or mortgagee shall in no case be bound to see to the application of the money raised. This would be a consistent rule on which everybody would be able to act, authorized, too, by the words of the testator, and drawing none of those fine distinctions which embarrass courts and counsel, and lead to litigation." *Stronghill v. Anstey*, 1 De G., M. & G. 653.

The rule, as thus stated, is placed upon the ground that when a testator, by his will, has given his trustees a power to sell to pay debts generally, or to pay particular debts, or to pay legacies only, he has reposed a special confidence in the trustee for those

purposes ; and in all such cases, it is unreasonable to require the purchaser to look to the application. *Id.* This principle has been characterized as the true one to designate an intelligible distinction among the cases. See 2 Story's Eq. Juris. 1132 *a* ; 3 Redf. on Wills, 236 ; see, also, *Grant v. Hook*, 13 Serg. & R. 259 ; *Cadbury v. Duval*, 10 Barr (Penn.), 265.

CHAPTER XIII.

ASSAULT AND BATTERY.

ARTICLE I.

OF ASSAULT AND BATTERY.

Section 1. What is an assault. An assault is an attempt or offer to strike, beat, or commit any other act of violence on the person of another, and against his will, without actually doing it, or touching his person. *Johnson v. Tompkins*, 1 Baldw. (C. C.) 571, 600. Or, as otherwise defined, an assault is an unequivocal purpose of violence, accompanied by an act, which, if not stopped or diverted, will be followed by personal injury. *State v. Malcolm*, 8 Iowa, 413; *People v. Yslas*, 27 Cal. 630; and see *Commonwealth v. Ruggles*, 6 Allen (Mass.), 588; *Hays v. The People*, 1 Hill (N. Y.), 351; *State v. Vannoy*, 65 N. C. 532; *Reg. v. Martin*, 9 C. & P. 215; *Christopherson v. Bare*, 11 Q. B. 473. An assault may consist in striking at another with the hand, or with a stick, or by shaking the fist at him, or presenting a gun or other weapon within such distance as that a hurt might be given, or by drawing a sword and brandishing it in a menacing manner; provided the act is done with intent to do some corporal injury. *United States v. Hand*, 3 Wash. 425; *Richels v. State*, 1 Sneed (Tenn.), 606; *United States v. Ortega*, 4 Wash. 534; *Murray v. Boyne*, 42 Mo. 472; *State v. Hampton*, 63 N. C. 13; *United States v. Myers*, 1 Cranch (C. C.), 310. To constitute an assault with a gun or pistol, it is necessary that the weapon should be presented at the party assaulted, within the distance at which it may do execution. *Tower v. State*, 43 Ala. 354; see *Higginbotham v. State*, 23 Tex. 574; *State v. Epperson*, 27 Mo. 255; *State v. Church*, 63 N. C. 15. But it is immaterial whether the weapon be loaded or not, if the plaintiff was ignorant upon that point. *Beach v. Hancock*, 7 Fost. (N. H.) 223; *State v. Smith*, 2 Humph. (Tenn.) 457; *State v. Shepard*, 10 Iowa, 126; *Commonwealth v. White*, 110 Mass. 407; *Crow v. State*, 41 Texas, 468. It is an assault, if one person ride after another, and oblige him to run to a place of safety, in order to avoid injury. *Morton v. Shoppee*, 3 C. & P. 373; see *State v. Rawles*, 65 N. C. 334;

State v. Sims, 3 Strobb. (S. C.) 197. Or, if he throw at him a missile capable of doing injury, with intent to wound, though it does not strike. *Morton v. Shoppee*, 3 C. & P. 373. Or advances, in a menacing attitude, to strike the plaintiff, so that the blow would in a few seconds have reached him, if the defendant had not been stopped. *Stephen v. Myers*, 4 id. 349. Or even, if at the time the defendant was stopped, he was not near enough for his blow to have taken effect. *State v. Vannoy*, 65 N. C. 532. To violently attack and strike with a club, the horse harnessed to a carriage in which a person is riding, would seem to be an assault upon the person. *De Marentille v. Oliver*, 1 Penning. (N. J.) 380; see *Kirland v. State*, 43 Ind. 146. And to approach a person in possession of chattels, brandishing a knife and threatening and intending to do him bodily harm, unless he yields possession, is an assault. *Barnes v. Martin*, 15 Wis. 240; see, also, *United States v. Richardson*, 5 Cranch (C. C.), 348; *State v. Morgan*, 3 Ired. L. (N. C.) 186. So, where the defendant ordered the plaintiff to leave his shop, and on his refusal, sent for some men, who gathered round the plaintiff, tucked up their sleeves and aprons, and threatened to break his neck if he did not go out, and would have put him out if he had not gone out; this was held to be an assault upon the plaintiff. *Read v. Coker*, 24 Eng. Law & Eq. 213; S. C., 13 C. B. 850. Cutting off the hair of a pauper in a poor-house was held to be an assault. *Forde v. Skinner*, 4 C. & P. 239; and so, of hitting at one man and unintentionally striking another. *James v. Campbell*, 5 C. & P. 372; see *State v. Myers*, 19 Iowa, 517. And to put a deleterious drug into coffee, in order that another may take it, if it is actually taken, amounts to an assault. *Button's Case*, 8 Carr. & P. 660. And it is an assault to take indecent liberties with a female pupil or patient, although no resistance be offered. *Rex v. Rosinski*, Ry. & M. 19; *Rex v. Nichol*, Russ. & Ry. 130; see *Hays v. The People*, 1 Hill (N. Y.), 351; *Rex v. Jackson*, Russ. & Ry. 487.

§ 2. What is not an assault. Mere threats, unaccompanied by an offer or attempt to inflict bodily harm, do not constitute an assault. *State v. Mooney*, Phill. L. (N. C.) 434; *Smith v. State*, 39 Miss. 521; *Keyes v. Deolin*, 3 E. D. Smith (N. Y.), 518; *Stephens v. Myers*, 4 C. & P. 349. And words accompanying a threatening gesture may deprive the gesture of the character of an assault (*Commonwealth v. Eyre*, 1 Serg. & R. [Pa.] 347); as where the defendant raised his whip, and shook it at the plaintiff,

though within striking distance, and made use of the words: "Were you not an old man, I would knock you down" (*State v. Crow*, 1 Ired. L. [N C.] 375); or, where one said, laying his hand on his sword in a threatening manner, "If it were not assize-time I would not take such language from you." *Tuberville v. Savage*, 1 Mod. 3. So it has been held that, if a man presents an unloaded pistol at another, and at the same time says that he does not intend to shoot him, this is no assault. *Blake v. Barnard*, 9 C. & P. 628.

The drawing a pistol, without presenting or cocking it, does not amount to an assault. *Lawson v. State*, 30 Ala. 14. And the same was held where a person, holding a cocked pistol by his side, said to his antagonist, without any attempt to use the pistol, "I am now ready for you." *Warren v. State*, 33 Tex. 517. So holding the pistol in the hand or hands, pointing in the direction of a man within distance, but not held as if about to fire, and without the immediate intention to fire, is not a presenting, and does not constitute an assault. *Woodruff v. Woodruff*, 22 Ga. 237; *Farver v. State*, 43 Ala. 354. And where the defendant presented a gun, within shooting distance, against the prosecutor, who was then armed with a knife and about to attack the defendant, but there was no attempt to use the gun nor any intention to use it, unless first assailed with the knife, this was held no assault. *State v. Blackwell*, 9 id. 79.

A person who fires a pistol merely to frighten an assailant, and hits him, is not guilty of an assault and battery if the attack was so formidable as to justify in self-defense the defendant, thus exposing the person of the assailant to danger. *Commonwealth v. Mann*, 116 Mass. 58.

Stopping and preventing a person by means of threats, from passing along the public highway, was held to be an illegal imprisonment and an assault. *Bloomer v. State*, 3 Sneed (Tenn.), 66. But to stand in another's way, and passively obstruct his progress, as any inanimate object would, though by design, is no assault; as where a policeman, in this manner, prevented a member of a society from entering the society's room. *Innes v. Wylie*, 1 Car. & K. 257. And, generally, any mere omission will not constitute an assault. Thus, where a man kept an idiot, bed-ridden brother in a dark room in his house, without sufficient warmth or clothing, it was held not to amount to an assault. *Smith's case*, 2 Carr. & P. 449. So it is no assault to separate persons who are fighting. *Griffin v. Parsons*, 1 Selw. 25, 26.

Acts which may embarrass and distress do not necessarily amount to an assault. Thus, a declaration alleging that the defendant, with force and arms, committed an assault upon the female plaintiff, is not sustained by evidence, that the defendant, a reasonable time after determining the plaintiff's tenancy, peaceably entered the premises, requested the plaintiffs to leave and remove their furniture, and upon their refusal burst open an inner door, which she wrongfully fastened and refused to open, took off the doors and windows on a cold day in winter, brought a bloodhound into the house, made a great noise in the premises for several days, and refused to permit any food to be furnished to her from the outside. *Stearns v. Sampson*, 59 Me. 568; S. C., 8 Am. Rep. 442. So, a declaration which alleges that A broke and entered a house, and committed an assault on B therein, is not proved, as to the assault, by evidence that A, having a right to immediate possession of the house, entered the same and forcibly took away the windows of the room in which B was sick in bed, without evidence that A knew that B was in the house. *Meador v. Stone*, 7 Metc. (Mass.) 147.

§ 3. What is a battery. A battery is an unlawful touching the person of another by the aggressor himself, or by any other substance put in motion by him. 1 Saund. 29. And see *Commonwealth v. Ruggles*, 6 Allen (Mass.), 588; *Kirland v. State*, 43 Ind. 146; S. C., 13 Am. Rep. 386, 392; *Johnson v. State*, 35 Ala. 363. And every battery includes an assault. *Johnson v. State*, 17 Tex. 515. The mere laying of the hand gently on the person of another, if done in anger, or in a rude and insolent manner, or with a view to hostility, amounts to a battery. *Id. Cole v. Turner*, 6 Mod. 149; *United States v. Ortega*, 4 Wash. 534. So, if one is violently jostled out of the way, or is spit upon. *James v. Campbell*, 5 Carr. & P. 372; *Reg. v. Cotesworth*, 6 Mod. 172; or has his hat insolently knocked off. *Ford v. Skinner*, 4 Carr. & P. 239; or has water, stones, or dirt rudely thrown upon him; *Pursell v. Horn*, 8 Ad. & El. 604; or is pushed back by the open hand of another placed upon his breast. *State v. Baker*, 65 N. C. 322; the person guilty of the violence in these cases may be held liable in an action for an assault and battery. And any thing attached to the person partakes of its inviolability; hence, a blow on the skirt of one's coat, when upon his person, is an assault and battery. *Republica v. DeLongchamps*, 1 Dall. 114. And so of striking one's cane, while in his hand. *Id. Kirland v. State*, 43 Ind. 146; S. C., 13 Am. Rep. 386, 392; or taking hold

of one's clothes in an angry or insolent manner. *United States v. Ortega*, 4 Wash. 534. Striking a horse which a man is riding, whereby he is thrown, is a battery (*Dodwell v. Burford*, 1 Mod. 24; S. C., 1 Sid. 433; *Bull v. Colton*, 22 Barb. 94. See *Kirland v. State*, 43 Ind. 146; S. C., 13 Am. Rep. 386); as is likewise upsetting a carriage or chair, in which one is sitting. *Hopper v. Reeve*, 7 Taunt. 698. And it is a battery for an officer to handcuff a prisoner previous to his conviction, when there is no attempt to escape, nor any reasonable ground to fear a rescue. *Griffin v. Coleman*, 4 H. & N. 265; *Wright v. Court*, 4 B. & C. 596.

Although the least touching of another in anger is a battery, yet the mere taking hold of the coat, or laying the hand gently upon the person, does not amount to this offense, if done in friendship, or for a benevolent purpose, and the like. See *Cole v. Turner*, 6 Mod. 149; *United States v. Ortega*, 4 Wash. (C. C.) 531; *Coward v. Baddeley*, 4 H. & N. 481; *Wiffin v. Kincard*, 2 B. & P. (N. R.) 472. The party's intention must be considered, for people will sometimes, by way of joke or in friendship, clap a man on the back, and it would be ridiculous to say that every such case constitutes a battery. Lord HARDWICKE, in *Williams v. Jones*, Hard. 301. See *Fitzgerald v. Carin*, 110 Mass. 153.

§ 4. **Wounding and mayhem.** Where the assault is carried to the extent of wounding a person, the offense is, of course, regarded in a much more serious light than a common assault, and the person injured will be entitled to recover heavy damages, unless the wounding can be justified or excused in some of the ways to be hereafter mentioned. Mayhem is defined to be the act of unlawfully and violently depriving another of the use of such of his members as may render him less able in fighting, either to defend himself or annoy his adversary. 2 Bouv. Dict. 163. Thus the cutting or disabling, or weakening, a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which abates his courage, are held to be mayhems. Id.; *Chick v. State*, 7 Humph. (Tenn.) 161. But cutting off the ear or nose, or the like, are not held to be mayhems at common law. 4 Bl. Com. 205. See *Godfrey v. People*, 5 Hun (N. Y.), 369.

Mayhem is an aggravated trespass (*Commonwealth v. Newell*, 7 Mass. 245, 248); and one peculiar feature for an action at common law for a mayhem is said to be that the court in which the action is brought have a discretionary power to increase the

damages, if they think the jury at the trial have not been sufficiently liberal to the plaintiff. But this must be done *super visum vulneris*, and upon proof that it is the same wound concerning which evidence was given to the jury. See *Brown v. Seymour*, 1 Wils. 5; *Cook v. Beal*, 1 Ld. Raym. 176, 339; S. C., 3 Salk. 115; Bul. (N. P.) 21. It would seem, however, that this common-law rule is no longer recognized, and the true doctrine is, that in all cases sounding in damages, these damages are to be assessed by the jury, under the authority of the court, and not by the court independently of the jury. *McCoy v. Lemon*, 11 Rich. (S. C.) 165; *Worster v. Proprietors of Canal Bridge*, 16 Pick. (Mass.) 547.

ARTICLE II.

OF DEFENSES, EXCUSES AND JUSTIFICATION.

Section 1. Accident. The subject of accident has been discussed at length in a preceding chapter. See *ante*, 160, chap. III. It may be stated generally, however, that if an injury is occasioned by an unavoidable accident, no action will lie for it; but if any blame is imputable to the defendant, though he had no intention to injure the plaintiff or any other person, he is liable for the damages sustained. *Dygert v. Bradley*, 8 Wend. 469; *Harvey v. Dunlop*, Hill & Denio (N. Y.), 193; *Brown v. Collins*, 53 N. H. 442; 16 Am. Rep. 372; *Losee v. Buchanan*, 51 N. Y. (6 Sick.) 476; S. C., 10 Am. Rep. 623. By an unavoidable accident, in legal phraseology, is not to be understood an accident which it was physically impossible in the nature of things for the defendant to have prevented; but that it was not occasioned in any degree, either remotely or directly, by the want of such care or skill as the law holds every man bound to exercise. *Wakeman v. Robinson*, 1 Bing. 212; *Dygert v. Bradley*, 8 Wend. 469; and see *Brown v. Kendall*, 6 Cush. (Mass.) 292; *Paxton v. Boyer*, 67 Ill. 132; 16 Am. Rep. 615; *Castle v. Duryea*, 32 Barb. 280; S. C. affirmed, 2 Keyes, 169; 1 Abb. Ct. App. (N. Y.) 169.

✓ **§ 2. Self-defense.** An action for assault and battery may be successfully defended on the principle of self-defense; for if one strikes me first, or even only assaults me, I may strike in my own defense, and if sued for it may plead *son assault demesne*, or that it was the plaintiff's own original assault that occasioned it. 3 Bl. Com. 120; 3 Broom & Had. 129; vol. 2, 109, Wait's ed.

And a person is not liable for an unintentional injury resulting from the exercise of his right of self-defense, where neither negligence or folly is proved against him, *Paxton v. Boyer*, 67 Ill. 132; S. C., 16 Am. Rep. 615. Thus, where a person in lawful self-defense fires a pistol at an assailant, and missing him wounds an innocent by-stander, he is not liable for the injury, if guilty of no negligence. *Morris v. Platt*, 32 Conn. 75. But in repelling an assault, the force employed must be appropriate in kind and suitable in degree. See *Murray v. Boyne*, 42 Mo. 472; *Baldwin v. Hayden*, 6 Conn. 453; *Hazel v. Clark*, 3 Harr. (Del.) 22; *Gregory v. Hill*, 8 Term. R. 299; *Gallagher v. State*, 3 Minn. 270; *Taylor v. Clendening*, 4 Kans. 524. Thus, as a general rule, the law will not justify a man who repels a blow with the fist, by stabbing his assailant; but whether or not such stabbing amounts to self-defense, depends upon the nature and violence of the assault thus repelled. *Floyd v. State*, 36 Ga. 91. And in an action for an assault by shooting, it was held that a man who is assaulted under such circumstances as authorize a reasonable belief that the assault is made with a design to take his life, or inflict extreme bodily injury, will be justified if he kill, or attempt to kill, his assailant. *Morris v. Platt*, 32 Conn. 75. So, the degree of force which may be employed in repelling the assault depends to some extent upon the known character of the assailant, whether peaceable or quarrelsome. *Harrison v. Harrison*, 43 Vt. 417. It is not a man's belief, simply, that he will be struck, that will justify him in striking first, but this belief founded on reasonable grounds of apprehension. *State v. Bryson*, 1 Wins. (N. C.) No. 2, 86. And a person who seeks a fight, or provokes another to strike him, cannot justify a blow on the ground of self-defense. *Id.* *Watrous v. Steel*, 4 Vt. 629.

§ 3. **Defense of another.** The right to repel an assault by force is not restricted to the defense of one's own person, but also extends to the mutual and reciprocal defense of each other by husband and wife, parent and child, master and servant. 2 Broom & Had. Com. (Wait's notes) 2; *Hathaway v. Rice*, 19 Vt. 102. But it is held that a son can justify an assault and battery in defense of his father only where the latter was first assailed, and was resisting the attack when the former interfered; and only to the extent of such force as may be necessary for the father's defense. *Obier v. Neal*, 1 Houst. (Del.) 449.

To justify an assault by the father, in defense of his son, it is sufficient if the danger to the latter is such as to induce a person

exercising a reasonable judgment to interfere, in order to prevent the consummation of the injury. *Hill v. Rogers*, 2 Iowa, 67. That a person may lawfully interfere in behalf of a stranger, and employ a reasonable amount of force to protect him from unlawful violence, thus avoiding a breach of the peace. See *Mellen v. Thompson*, 32 Vt. 407.

§ 4. **Defense of land, house, etc.** The rightful owner of a house or lands, being in the peaceable possession thereof, and having the right to the possession, will be justified in using all necessary force to defend his possession against any forcible attempt made to expel him. *Gregory v. Hill*, 8 T. R. 299; *Corey v. The People*, 45 Barb. 262; *Parsons v. Brown*, 15 id. 590. And the son of the owner, acting under the latter's authority, has likewise the same right. *Tribble v. Frame*, 7 J. J. Marsh. (Ky.) 599, 617. So one who has rented a house, as tenant of the owner, and acts under him in entering it, possesses the same right to use force in keeping the possession that the owner has. *Corey v. The People*, 45 Barb. 262. And mechanics who are in charge of a house which they are engaged in building, have a right to gently remove persons coming into the building without authority. *United States v. Bartle*, 1 Cranch (C. C.), 236. But one having a right to enter on land and make improvements, not interfering with the tenant's farming operations, cannot be forcibly expelled until he actually does so interfere. *McAuley v. State*, 3 Iowa, 435. And a tenant in common has no right to inflict a battery upon one who enters upon the land under the authority of the co-tenant; and, in this respect, there is no distinction between the co-tenant and one entering with him, and under his authority. *Cansee v. Anders*, 4 Dev. & B. L. (N. C.) 246; and see *Commonwealth v. Lakeman*, 4 Cush. (Mass.) 597.

It has been held, however, that where A gives B verbal permission "to dig and carry away ore," and B assigns the license to C, who enters forcibly into the premises of A, the latter being at the time the owner of the freehold, and warning C not to attempt to enter, C is a trespasser, and may be resisted by A with all the force requisite to protect his possession. *Riddle v. Brown*, 20 Ala. 412.

If a person enters a house with force and violence, the person whose house is entered may justify turning him out by force, without making a previous request to him to depart (*Tullay v. Reed*, 1 Carr. & P. 6); but if he enters quietly he must be requested to leave, and upon refusing to do so, the owner may then use

as much force as is necessary to put him out. *Id.*; *State v. Woodward*, 50 N. H. 527. So, one who enters an office for the transaction of business may be ejected by the owner or agent, after a request to leave and a refusal, no more force being used than is necessary. 45 Ill. 367. See *Esty v. Wilmot*, 15 Gray (Mass.), 168; *Pierce v. Hicks*, 34 Ga. 259; *Timothy v. Simpson*, 6 Carr. & P. 500. And the sale of a ticket of admission to a place of public amusement is held to be only a revocable license to the purchaser to enter the building or inclosure to attend the performance; and, if revoked before the performance has commenced, and before he has taken the seat to which the ticket entitles him, and he remains therein after notice of the revocation and refuses to depart upon request, he becomes a trespasser, and may be removed by the use of such force as is necessary for the purpose. *Burton v. Scherpf*, 1 Allen (Mass.), 133; *McCrea v. Marsh*, 12 Gray (Mass.), 211; *Wood v. Leadbitter*, 13 Mees. & Wels. 838; *Bridges v. Purcell*, 1 Dev. & Bat. (N. C.) 492. But, where one has entered the house of another in a peaceable manner and for a lawful purpose, he may rightfully resist any attempt to eject him, before his purpose has been accomplished. Thus, where one is lawfully in the house of another for the purpose of serving a subpoena, he may use such force as is necessary to overcome any resistance he may meet with in the service of the subpoena, being liable only for an excess of violence beyond what is necessary to overcome the resistance. *Hagar v. Danforth*, 20 Barb. 16; reversing S. C., 8 How. 435. And any person has a right, though merely from motives of curiosity, to enter the office of a clerk of court, when open for public business, and remain so long as he conducts himself properly, and impedes not the business; and an action of trespass will lie against a clerk who ejects him therefrom. *O'Hara v. King*, 52 Ill. 303.

It is as unlawful for a grown son or daughter to create a disturbance in the family as for a mere stranger; and the father, as the head of the family, may as rightfully interpose to preserve the good order and propriety of his household in the one case as in the other, and such interference will not be an assault. *Smith v. Slocum*, 62 Ill. 354.

§ 5. **Defense of personal property.** At common law, the owner of goods and chattels personal may justify a battery of a person who endeavors wrongfully to dispossess him of them. 3 Bl. Com. 4; see *Gates v. Lounsbury*, 20 Johns. 427; *Scribner v.*

Beach, 4 Denio, 448; and if the goods are wrongfully in the possession of another, the owner, or his servants acting by his command, may justify an assault in order to repossess himself of them, no unnecessary violence being used. *Id. Blades v. Higgs*, 10 Com. B. (N. S.) 713. See 2 Broom & Had. (Wait's Notes) 4, note 429. The owner, in retaking his goods, is not justified in using such force or violence as would amount to a breach of the peace. *Id. Barnes v. Martin*, 15 Wis. 240; *Andre v. Johnson*, 6 Blackf. (Ind.) 375; *State v. Elliot*, 11 N. H. 540. And it is held that the defendant cannot justify an assault on the ground that he had an irrevocable license to enter upon the plaintiff's land for the purpose of removing his personal property therefrom, and that the plaintiff withstood his entry. *Churchill v. Hulbert*, 110 Mass. 42; S. C., 14 Am. Rep. 578.

§ 6. **Preserving the peace, etc.** A person who witnesses an affray may, during its continuance, and for the purpose of putting a stop thereto, lay hands upon those engaged in the affray. *Noden v. Johnson*, 16 Q. B. 218. And where one comes up in the midst of an affray, and forcibly interferes as a peacemaker by separating the combatants and preventing further violence, he is not guilty of a trespass, unless he uses more violence than is reasonably necessary for the purpose. *Timothy v. Simpson*, 6 Carr. & P. 500.

The master of a vessel has an undoubted authority to punish corporeally and summarily the negligence or misconduct of his men. *United States v. Hunt*, 2 Story, 120; *Bangs v. Little, Ware*, 506. Yet it is not an arbitrary and uncontrolled authority, and he is amenable to the law for the due exercise of it. *Brown v. Howard*, 14 Johns. 119. The rule on the subject has thus been stated: "By the common law, the master has authority over all the mariners on board the ship, and it is their duty to obey his commands in all lawful matters relative to the navigation of the ship, and the preservation of good order; and in case of disobedience or disorderly conduct, he may lawfully correct them in a reasonable manner; his authority, in this respect, being analogous to that of a parent over a child, or a master over his apprentice or scholar. Such an authority is absolutely necessary to the safety of the ship, and of the lives of the persons on board; but it behooves the master to be very careful in the exercise of it, and not to make his parental power a pretext for cruelty and oppression." *Abb. on Ship*. 125. And see

United States v. Freeman, 4 Mason, 512; *Fuller v. Colby*, 3 Woodb. & Minot, 13; *Thompson v. Busch*, 4 Wash. (C. C.) 340.

Except in the case of mariners on board ship, or in the case of bound apprentices, a master has no lawful authority to chastise his hired servant, otherwise than by words and remonstrance; and if he beat him, though moderately, by way of correction, it is good ground for the servant's departure, and he may support an action against the master for the battery. *Winstone v. Linn*, 1 B. & C. 469; *Mathews v. Terry*, 10 Conn. 455; *Newman v. Bennett*, 2 Chit. 195. So a man has no lawful authority to beat his wife (*Fulgham v. State*, 46 Ala. 143; *People v. Winters*, 2 Park. [N. Y.] 10), even though she be drunk or insolent. *Commonwealth v. Thompson*, 108 Mass. 461. But he may defend himself against her, and may restrain her from acts of violence toward himself or toward others (*People v. Winters*, 2 Park. [N. Y.] 10); and an action for an assault and battery will not lie by a *feme covert* against her husband. *Longendyke v. Longendyke*, 44 Barb. 366.

A schoolmaster is justified in the exercise of that amount of restraint toward a pupil which is necessary to answer the purposes of his employment; and he may lawfully resort to the use of as much force as may be necessary to remove a refractory scholar from the school, who refuses to leave on being requested to do so. *State v. Williams*, 27 Vt. 755. But the power to exercise corporal punishment must not be used as a pretext for cruelty and oppression. The cause must be sufficient, the instrument suitable, and the manner and extent of the correction, and the temper in which it is inflicted, should be distinguished with the kindness, prudence, and propriety becoming the station. *Cooper v. McJunkin*, 4 Ind. 290; *Gardner v. State*, id. 632; see *Lander v. Seaver*, 32 Vt. 114; *Commonwealth v. Randall*, 4 Gray (Mass.), 36.

A father has a right to direct which of the studies taught in a public school shall be pursued by his infant child who attends as a scholar; and, if a teacher who has notice of the father's direction, requires him to pursue other studies, and whips him for not doing so, he will be guilty of an assault and battery. *Morrow v. Wood*, 35 Wis. 59; S. C., 17 Am. Rep. 471.

§ 7. **Provocation.** An assault is sufficient to justify a blow, unless the battery be excessive. *Hazel v. Clark*, 3 Harr. (Del.) 22; *Dale v. Wood*, 7 Moore, 33. But no words of provocation, however angry and irritating, will justify an assault and battery.

Cushman v. Ryan, 1 Story, 91; *Thompson v. Mumma*, 21 Iowa, 65. And although a man assaulted in his own house need not retreat, but may use any degree of force or violence necessary for his protection, yet, even here, mere words, however violent, will not furnish a justifiable cause for an attack. *State v. Martin*, 30 Wis. 216. Words of provocation may, however, go in mitigation of damages. *Waters v. Brown*, 3 A. K. Marsh. (Ky.) 559; *Murray v. Boyne*, 42 Mo. 472; *Shorter v. People*, 2 N. Y. (2 Comst.) 193. But, to entitle the defendant to give evidence of provocation in mitigation of damages, the provocation must be so recent and immediate as to induce a presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it. *Id.*; *Coxe v. Whitney*, 9 Me. 531; *Lee v. Woolsey*, 19 Johns. 319; *Barry v. Ingles*, 2 Hayw. (N. C.) 102.

§ 8. **Expulsion by innkeepers.** An inn is a public house of entertainment for all who choose to visit it; and the innkeeper is obliged to entertain and furnish all travelers of good conduct and means of payment with what they may have occasion for as such travelers, whilst on their way. *Pinkerton v. Woodward*, 33 Cal. 557; *Commonwealth v. Mitchell*, 1 Phil. (1 Penn.) 63. But, if an individual has entered a public inn, and his presence is disagreeable to the proprietor or his guests, he has a right to request the person to depart; and if he refuses, the innkeeper has the right to lay his hands gently upon him, and lead him out, and if resistance is made, to employ sufficient force to put him out. And for so doing he can justify his conduct on a prosecution for assault and battery. *Id.*; S. C., 2 Pars. Sel. Cas. (Penn.) 431; *Howell v. Jackson*, 6 Carr. & P. 723; *Webster v. Watts*, 11 Q. B. 311; *Markham v. Brown*, 8 N. H. 523. See Inn-keepers.

§ 9. **Removing from religious meetings.** A religious society may prescribe such rules as they think proper for preserving order while assembled for public worship; and a person disturbing a religious meeting, and interrupting its order and decorum, may be removed therefrom by the application of force sufficient for that purpose. *McLain v. Matlock*, 7 Ind. 525; *Beckett v. Lawrence*, 7 Abb. (N. Y.) 403. And to justify the application of force for the removal of a person interrupting the order and decorum of such meeting, it is not necessary to show that the disturbance was willful. *Wall v. Lee*, 34 N. Y. (7 Tiff.) 141; *Ballard v. Bond*, 1 Jur. 7. But the offender should be requested to retire, before the application of force for his removal. *Id.*

§ 10. **Ejecting from public conveyances.** A person, who unreasonably refuses to pay his fare on a railroad train, may be ejected forthwith, without being taken to a regular station. *McClure v. Philadelphia, etc., R. R. Co.*, 34 Md. 532; see *Fink v. Albany, etc., R. R. Co.*, 4 Lans. (N. Y.) 147. So, where a railroad or steamboat company have appointed a superintendent with authority, by himself and his assistants, to have charge of the depot and manage its concerns, it is incident to his authority to exclude, or direct the exclusion of persons who persist in violating the reasonable regulations prescribed, and thereby interrupt the officers and servants of the company in the discharge of their respective duties, or annoy passengers. *Commonwealth v. Power*, 7 Metc. (Mass.) 726; *Stephen v. Smith*, 29 Vt. 160; *Jencks v. Coleman*, 2 Sumner, 221. But no greater force should be used than is necessary for the purpose, *id.*; and the right of a railway conductor to eject a person from the cars for not paying his fare upon request to do so, must be exercised with regard to the particular circumstances of the case. See *Illinois, etc., R. R. Co. v. Sutton*, 53 Ill. 397; *Mobile, etc., R. R. Co. v. McArthur*, 43 Miss. 180. Thus, a railroad company may be held liable in damages for forcibly expelling a person while a train is in motion, and it is no defense that such person was not rightfully on the train. *Law v. Illinois, etc., R. R. Co.*, 32 Iowa, 534; *Samford v. Eighth Avenue R. R. Co.*, 23 N. Y. (9 Smith) 343; *Kline v. Central, etc., R. R. Co.*, 39 Cal. 587; *Rounds v. Delaware, etc., R. R. Co.*, 3 Hun (N. Y.), 329; S. C., 5 Pars. 475; see *Jackson v. Second Avenue R. R. Co.*, 47 N. Y. (2 Sick.) 274; S. C., 7 Am. Rep. 448. For a full statement of the law on this subject, see *Railways and Common Carriers*.

§ 11. **Consent.** An assault implies force upon one side, and repulsion, or, at least, want of assent, upon the other. An assault upon a consenting party would, therefore, be a legal absurdity. *Smith v. State*, 12 Ohio St. 466; *Duncan v. Commonwealth*, 6 Dana (Ky.), 595; see *ante*, 36, 146. It has accordingly been held that, in an action by husband and wife for an assault and battery on her, it is a good defense that the act complained of was committed with the consent, and at the request of the wife. *Pillow v. Bushnell*, 5 Barb. 156. And where one was whipped at his own request, to save him, as was supposed, from punishment for felony, it was held, that the act was not punishable, if done without malicious or revengeful motives. *State v. Beck*, 1 Hill (S. C.), 363. But a party may recover for an assault and

battery, notwithstanding he and his adversary fought by mutual consent. *Logan v. Austin*, 1 Stew. (Ala.) 476; *Bell v. Hansley*, 3 Jones' L. (N. C.) 131 *Stout v. Wren*, 1 Hawks. (N. C.) 420.

§ 12. **Damages in general.** In actions for assault and battery there is said to be no precise rule by which the damages may be measured; but that the same must be left to the discretion of a jury. *Commonwealth v. Sessions of Norfolk*, 5 Mass. 435, 437. This discretion is exercised by duly weighing all the circumstances of the case, and considering the state, degree, quality, trade and profession, as well of the party injured as of him who did the injury. *Coffin v. Coffin*, 4 Mass. 41. And see *Cox v. Vanderkleed*, 21 Ind. 164; *Slatert v. Rink*, 18 Ill. 527; *Brunswick v. Slowman*, 8 C. B. 317; *Wadsworth v. Treat*, 43 Me. 163. The plaintiff in such an action, without alleging special damages, is not confined to the recovery of merely nominal damages, but may recover such general damages as he may prove to have resulted from the injury. *Andrews v. Stone*, 10 Minn. 72. In estimating the damages, personal suffering, as well as medical expenses and the direct pecuniary loss, are proper subjects for compensation (*Ransom v. N. Y. & Erie R. R. Co.*, 15 N. Y. [1 Smith] 415; *Smith v. Holcomb*, 99 Mass. 552; *Pennsylvania, etc., Canal Co. v. Graham*, 63 Penn. St. 290; *Smith v. Overby*, 30 Ga. 241; *Klein v. Thompson*, 19 Ohio St. 569); and it is held that the expenses of the litigation may also be taken into consideration. *Cleveland, etc., R. R. Co. v. Bartram*, 11 Ohio St. 457; *New Orleans, etc., R. R. Co. v. Allbritton*, 38 Miss. 242; *Noyes v. Ward*, 19 Conn. 250. So it is proper for the jury to take into consideration any natural and necessary consequences resulting to the plaintiff from the act of violence, and to allow damages therefor. *Fetter v. Beale*, 1 Ld. Raym. 339; *Moor v. Adams*, 2 Chit. 198; *Slater v. Rink*, 18 Ill. 527. The mental suffering of the plaintiff from the insult and indignity of the defendant's blows, may likewise be considered by the jury. *Smith v. Holcomb*, 99 Mass. 552; *Wadsworth v. Treat*, 43 Me. 163; *Ford v. Jones*, 62 Barb. 484. And even where there is no insult or indignity, mental suffering may be ground of damage. *Canning v. Williamstown*, 1 Cush. (Mass.) 451.

§ 13. **Aggravation of damages.** In an action for an assault and battery, the plaintiff usually, and as a general rule, has a right to expect a fair compensation in damages for the injury really sustained; but, in addition to this, the jury may sometimes be called upon to give exemplary damages by way of punishment

where it appears that the defendant was actuated by malice and a total disregard of the laws, and the plaintiff was in no wise to blame. *Causee v. Anders*, 4 Dev. & B. L. (N. C.) 246; *McNamara v. King*, 7 Ill. 432; *Wilson v. Middleton*, 2 Cal. 54; *Guengerich v. Smith*, 37 Iowa, 587. Thus, where at the close of a trial, and immediately upon the adjournment of the court thereafter, in the court-room and in the presence of a large number of persons, one of the parties to the suit deliberately spat in the face of the other, it was held, in an action brought by the injured party against the perpetrator of the act, that the case was a most fit one for the award of punitive damages, and it appearing that the defendant was a wealthy man, a verdict for \$1,000 was regarded as not excessive. *Alcorn v. Mitchell*, 63 Ill. 553. So, generally, a jury is authorized to give exemplary damages, where the elements of fraud, malice, gross negligence, or oppression, mingle in and form part of the cause of action. *Albert Wiley v. Keokuk*, 6 Kans. 94; *Malone v. Murphy*, 2 id. 250; *Gore v. Chadwick*, 6 Dana (Ky.), 477; *West v. Forrest*, 22 Mo. 344; *New Orleans, etc., R. R. Co. v. Statham*, 42 Miss. 607; *Baltimore R. R. Co. v. Breinig*, 25 Md. 378; *Etchberry v. Levielle*, 2 Hilt. (N. Y.) 40; *Klingman v. Holmes*, 54 Mo. 304. And such damages may be awarded even though the defendant is liable to be punished criminally. *Wilson v. Middleton*, 2 Cal. 54; or has been already so punished. *Hoadley v. Watson*, 45 Vt. 289; *Jefferson v. Adams*, 4 Harr. (Del.) 321; *Phillips v. Kelly*, 29 Ala. 628; *Roberts v. Mason*, 10 Ohio St. 277. But it is otherwise in Indiana, in cases of malicious trespass. *Butler v. Mercer*, 14 Ind. 479. And in New Hampshire, damages recoverable in a civil action for assault and battery, must be founded on the idea of compensation for the injury. The jury may allow for injury to the feelings as well as to the person. But to go beyond all elements of injury to the plaintiff, and give what are literally punitive damages, is not allowable. *Fay v. Parker*, 53 N. H. 342; see, also, *Smith v. Pittsburgh, etc., R. R. Co.*, 23 Ohio St. 10; *Lucas v. Flinn*, 35 Iowa, 9. And in *Mooney v. Kennett*, 19 Mo. 551, it was held that an instruction allowing "smart money" in case of assault and battery was erroneous.

§ 14. **Mitigation of damages.** In an action for assault and battery, it is a general rule, that abusive and insulting language may be shown in evidence, in mitigation of damages, when it immediately precedes the act done, so as naturally to provoke it.

Oushman v. Ryan, 1 Story, 91; *State v. Quinn*, 2 Mill. Const. (S. C.) 694; *Waters v. Brown*, 3 A. K. Marsh. (Ky.) 559; *Boone v. State*, 31 Tex. 557; *Castner v. Sliker*, 33 N. J. (4 Vr.) 95; *ante*, 342, § 7. But each case should be controlled by its own peculiar circumstances; and it is said, the question should be, not how many hours have elapsed since the provocation was given, but whether, in view of the circumstances of the case, the party has had a reasonable time to cool his blood. *Dolan v. Fagan*, 63 Barb. 73. And where the acts done, or the words spoken, are a portion of a series of provocations frequently repeated and continued down to the time of the assault, they may be proven. *Stellar v. Nellis*, 60 Barb. 524; S. C., 42 How. (N. Y.) 163. But it would seem that no provocation, amounting to less than justification, will render the defendant liable in less than compensatory damages. *Birchard v. Booth*, 4 Wis. 67; see *Dresser v. Blair*, 28 Mich. 501. And circumstances which amount to a complete justification cannot be given in evidence in mitigation of damages, if those circumstances could have been pleaded. *Watson v. Christie*, 2 Bos. & Pul. 224.

Evidence of declarations of the plaintiff respecting the defendant is not admissible in mitigation of damages, unless they are shown to have been communicated to the defendant. *Gaither v. Blowers*, 11 Md. 536. And where husband and wife join in an action for an assault on the wife, no words or acts of the husband can be proved in mitigation of damages unless the wife was privy to them. *Everts v. Everts*, 3 Mich. 580.

CHAPTER XIV.

ASSETS, ADMINISTRATION OF.

ARTICLE I.

GENERAL RULES RELATING TO ADMINISTRATION OF.

Section 1. What are to be deemed assets. The word *assets* is derived from the French word *assez*, which means sufficient, or enough; and it formerly signified what its etymology indicates: the property of a deceased person *sufficient* to pay his debts and legacies. But the word is no longer confined to this original and strictly appropriate meaning, and is now constantly used to signify any property, estate or fund applicable to the payment of debts, though quite *insufficient* in amount or value for the purpose. 1 Burr. Dict. 142, 143. In an accurate and legal sense, all the personal property of the deceased, which is of a salable nature, and may be converted into ready money, is deemed assets. 1 Broom & Had. 844, n. (Wait's ed.); 2 Bl. Com. 510; 1 Story's Eq. Juris., §531. But in a larger sense the *real* and *personal* property of the deceased, which, either in the hands of his heir or devisee, or of his executor or administrator, is *chargeable* with the payment of his debts and legacies, is *assets*. See Id.; 1 Broom & Had. 847 (Wait's ed.); 2 Bl. Com. 244, 340; 2 Steph. Com. 244, note.

§ 2. Legal assets. The property of a deceased person, which the common law can reach for the purpose of satisfying his creditors, is commonly termed *legal assets*. See 2 Lead. Cas. Eq. 72, 78; *Farr v. Newman*, 4 T. R. 621. So, legal assets have been defined as those portions of the property of a deceased person of which his executor or heir may gain possession, and in respect whereof he may be made chargeable, by the process of the ordinary tribunals, and without the necessity of equitable interference. Adams' Eq. 252. A more accurate description claimed for them is, that they are such as come into the hands and power of an executor or administrator, or such as he is intrusted with by law, *virtute officii*, to dispose of in the course of administration. In other words, whatever an executor or administrator takes *qua* executor or administrator, or in

respect to his office, is to be considered *legal assets*. 1 Story's Eq. Juris., § 551; and see *Attorney-General v. Brunning*, 6 Jur. (N. S.) 1083; *Deg v. Deg*, 2 P. Wms. 416, and note; *Lovegrove v. Cooper*, 2 Sm. & Giff. 271. They consist of the personal estate of the deceased, to which the executor or administrator is entitled by virtue of his office (2 Lead. Cas. Eq. 78); and wherever real estate is by statute made liable for the payment of the debts of the deceased, it also constitutes legal assets. *Id.*; *Goodchild v. Terret*, 5 Beav. 398. But, notwithstanding such statutory provision, it is held that a devise of real estate for the payment of the testator's debts renders the estate so charged, *equitable* and not *legal assets*. *Charlton v. Wright*, 12 Sim. 274; 2 Lead. Cas. Eq. 82, 83.

§ 3. **Equitable assets.** Equitable assets are such as cannot be reached without the assistance of equity; or they are those portions of the property which, by the ordinary rules of law, are exempt from debts, but which the testator has voluntarily charged as assets, or which, being non-existent at law, have been created in equity. Thus, where a testator devises land to trustees, to be sold for the payment of debts, the assets resulting from the execution of the trust are equitable assets upon the plain intent of the testator, notwithstanding the trustees are also made his executors; for, by directing the sale to be for the payment of debts generally, he excludes all preferences, and the property would not otherwise be liable to the payment of simple contract debts. *Benson v. Leroy*, 4 Johns. Ch. 651; *Bain v. Sadler*, L. R., 12 Eq. 570; *Barker v. May*, 9 Barn. & C. 489. And the same principle is applicable, where the testator merely charges his lands with the payment of his debts. *Id.* See 2 Lead. Cas. Eq. 81. But if the estate be of an equitable nature, and be chargeable with debts, the fund is to be deemed equitable assets, unless by some statute it is expressly made legal assets; for it cannot be reached except through the instrumentality of a court of equity. And it is stated, as a general principle, that every thing is considered as equitable assets, which the debtor has made subject to his debts generally, and which, without his act, would not have been subject to the payment of his debts generally. See 1 Story's Eq. Juris., § 552; 2 Lead. Cas. Eq. 72, 81, *et seq.*

The doctrine of *equitable assets* was introduced at an early period into the jurisprudence of the United States, but its importance has been very greatly diminished on account of its adoption and incorporation into the statute law of most of the

States. And even in those States where the doctrine has not been recognized by statute, the sphere of its practical operation has been limited, by the extension of legal remedies, to all the property of the debtor not included in the class of equitable assets. See *Sperry's Estate*, 1 Ashm. (Penn.) 347.

It should be remembered, however, that the adoption of equitable principles by the statute law does not weaken their force as principles, nor render them inapplicable in cases admitting of their application. *Torr's Estate*, 2 Rawle (Penn.), 250; 2 Lead. Cas. Eq. 88. In the absence of any statutory enactment, the rule is recognized that a charge of debts by will upon lands, or a devise in trust for the payment of debts, converts the whole fund into equitable assets, and brings it within the equitable principle of equal distribution. *Backhouse v. Patton*, 5 Pet. 160; *Black v. Scott*, 2 Brock. 325; *Cloudas' Ex'r v. Adams*, 4 Dana (Ky.), 603; *Speed's Ex'r v. Nelson's Ex'r*, 8 B. Monr. (Ky.) 499. See, also, as to the doctrine, *Benson v. Le Roy*, 4 Johns. Ch. 651; *Moses v. Murgatroyd*, 1 id. 119; *Henderson v. Burton*, 3 Ired. (N. C.) 259.

§ 4. Principles of distribution. The mere change of the forum in which assets are distributed, from law into equity, will not vary the character of the assets nor affect the order of their distribution. In the distribution of *legal* assets, courts of equity follow the same rules which are adopted by courts of law, and give the same priority to the different classes of creditors, which is enjoyed at law. This is in accordance with the maxim, *Æquitas sequitur legem*. See *ante*, 152. *Atkinson v. Gray*, 18 Jur. 283; *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Purdy v. Doyle*, 1 Paige's Ch. (N. Y.) 558. Especially will priorities of liens be regarded. *Ib.*; *Averill v. Loucks*, 6 Barb. (N. Y.) 470; *Pascal's v. Canfield*, 1 Edw. Ch. (N. Y.) 201; see *Wilder v. Keeler*, 3 Paige's Ch. (N. Y.) 167; *Thompson v. Brown*, 4 Johns. Ch. 619; 2 Lead. Cas. Eq. 88 (252).

But, in respect to assets, which are the growth of equitable jurisdiction, and the fruit of equitable principles, the maxim that equality is equity, is applicable; and such assets will be distributed by courts of equity equally, and *pari passu*, among all the creditors, without any reference to the priority or dignity of the debts. *Ib.*; *Ante*, 155; *Deg v. Deg*, 2 P. Wms. 412, 416; *Wilson v. Paul*, 8 Sim. 63; *Bain v. Sadler*, L. R., 12 Eq. 570; see *Codwise v. Gelston*, 10 Johns. 507. If the fund is insufficient to pay all the creditors, they are required to abate in proportion. So, if lands

and other property, not strictly legal assets, are charged with the payment of debts and legacies, all the legatees take *pari passu*; and in case of an insufficiency of equitable assets (after payment of the debts) to pay all the legacies, the legatees are required to abate in proportion, unless the testator has otherwise directed. *Brown v. Brown*, 1 Keen, 275; 1 Story's Eq. Juris., § 555.

As between creditors and legatees, the former are entitled to a priority and preference; the latter taking nothing until the debts are all paid. *Ib.*; *Kidney v. Coussmaker*, 12 Ves. 154; see *Freeman v. Okey*, 3 Jones' Eq. (N. C.) 473; *Elliot v. Posten*, 4 id. 433; *Sims v. Sims*, 2 Stockt. Ch. (N. J.) 158; *Terhune v. Colton*, 2 id. 21.

Where the assets are partly legal and partly equitable, a court of equity will not take away the legal preference on legal assets, but if any creditor has been partly paid out of the legal assets, by insisting on his preference, and he seeks satisfaction of the residue of his debt out of the equitable assets, he will be postponed till all the other creditors not possessing such a preference have received out of such equitable assets an equal proportion of their respective debts. 2 Lead. Cas. Eq. 88 (252); *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Deg v. Deg*, 2 P. Wms. 416; *Cornish v. Willson*, 6 Gill. (Md.) 303. And see *Purdy v. Doyle*, 1 Paige, 558; *Wilder v. Keeler*, 3 id. 165.

Very generally, by statute, in the United States, and now also in England, the rule of law is that all the property of the deceased, real and personal, is liable for his debts; and the following is the order of administering assets for creditors in equity, unless a different order is prescribed by statute: 1. The personal estate not specifically bequeathed; 2. Real estate devised or ordered to be sold for the payment of debts; 3. Real estate descended but not charged with debts; 4. Real estate devised, charged generally with the payment of debts; 5. General pecuniary legacies *pro rata*; 6. Real estate devised, not charged with debts. See, generally, 2 Lead. Cas. Eq. 72; *Adams v. Brackett*, 5 Metc. (Mass.) 280; *Livingston v. Newkirk*, 3 Johns. Ch. 312; *Hays v. Jackson*, 6 Mass. 149; *Harvey v. Steptoe*, 17 Gratt. (Va.) 289; *Shorr v. McCameron*, 11 Serg. & R. 252; *Ward v. Ward*, 15 Pick. 511; 1 Bouv. Dict. 155; *Chase v. Lockerman*, 11 Gill & J. (Md.) 185; *Schermerhorn v. Barhydt*, 9 Paige, 29; *Livingston v. Livingston*, 3 Johns. Ch. 148; *Stroud v. Barnett*, 3 Dana (Ky.), 394; *Gallagher's Appeal*, 48 Penn. St. 122; *Salis-*

bury v. Morss, 7 Lans. (N. Y.) 359; *House v. Raymond*, 3 Hun (N. Y.), 44; S. C., 5 N. Y. S. C. (T. & C.) 248.

§ 5. **Marshaling assets.** In the sense of a court of equity, the marshaling of assets is such an arrangement of the different funds under administration as shall enable all the parties having equities thereon to receive their due proportions, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of these funds. 1 Story's Eq. Juris., § 558. The principle upon which the court proceeds is, that a creditor having his choice of two funds ought to exercise his right of election in such a manner as not to injure other creditors, who can resort to only one of these funds. But if contrary to equity, he should so exercise his legal rights as to exhaust the fund to which alone other creditors can resort, then those other creditors will be placed by a court of equity in his situation, so far as he has applied their fund to the satisfaction of his claim. *Alston v. Mumford*, 1 Brock. 266. This principle is well settled in the jurisprudence of this country as well as in that of England (see *Goss v. Lester*, 1 Wis. 43; *Kendall v. New Eng. Co.*, 13 Conn. 394; *Piatt v. St. Clair*, 6 Ham. [Ohio] 233; *Russell v. Howard*, 2 McLean, 489; *Evertson v. Booth*, 19 Johns. 486); and it is not confined to the case of creditors, but is also applied to other persons standing in a similar predicament. *Dorr v. Shaw*, 4 Johns. Ch. 17; *Cheeseborough v. Millard*, 1 id. 412; *Oppenheimer v. Walker*, 3 Hun (N. Y.), 30; S. C., 5 N. Y. S. C. (T. & C.) 325. It will not, however, be applied where it would work injustice to the creditor, or other party in interest, having a title to the double fund, or where it would operate unjustly to the common debtor. See *Averill v. Loucks*, 6 Barb. 470. Nor is it applied in favor of persons who are not common creditors of the same common debtor, except upon some special equity. *Ex parte Kendall*, 17 Ves. 514, 520; *Lloyd v. Galbraith*, 32 Penn. St. 103. It applies, however, during the life-time of the debtor, as well as in the administration of his estate after his death (*Hawley v. Mancius*, 7 Johns. Ch. 174, 184; *Dorr v. Shaw*, 4 id. 17; 2 Lead. Cas. Eq. 71 [194]); though it has been said that courts of equity have no right to marshal the assets of a person who is alive. See *Lacam v. Mertins*, 1 Ves. Sen. 312.

A few cases will clearly illustrate the application of the general principle. Thus, if a specialty creditor, whose debt is a lien on the real estate, receive satisfaction out of the personal assets, a simple contract creditor (who has no claim except upon

those personal assets) shall in equity stand in the place of the specialty creditor against the real assets, so far as the latter shall have exhausted the personal assets in payment of his debt. *Clifton v. Burt*, 1 P. Wms. 679, note; *Cheeseborough v. Millard*, 1 Johns. Ch. 409, 413. And the same principle is applicable to the case of a mortgagee who exhausts the personal estate in the payment of his debts. The simple contract creditors will be allowed to stand in the place of the mortgagee, in regard to the real estate bound by the mortgage. *Aldrich v. Cooper*, 8 Ves. 382; 2 Lead. Cas. Eq. 205, *et seq.* See *Putnam v. Russell*, 17 Vt. 54; *Lyman v. Lyman*, 32 id. 79; *Lloyd v. Galbraith*, 32 Penn. St. 103; *Goss v. Lester*, 1 Wis. 43, 54; *Oppenheimer v. Walker*, 3 Hun (N. Y.), 30; S. C., 5 N. Y. S. C. (T. & C.) 325. So, the bounty of the testator entitles a legatee to marshal the assets; and the choice of the creditors, to proceed against the personal estate, instead of the real estate descended, shall not preclude the payment of the legacy. *Post v. Mackall*, 3 Bland. (Md.) 488. And see *Mollan v. Griffith*, 3 Paige's Ch. (N. Y.) 402; *Rice v. Harbeson*, 2 N. Y. S. C. (T. & C.) 4; *Brown v. James*, 1 Strobb. Eq. (S. C.) 424; *Robards v. Wortham*, 2 Dev. Eq. (N. C.) 173; *Chase v. Lockerman*, 11 Gill & J. (Md.) 186; 2 Lead. Cas. Eq. 215, *et seq.* And marshaling is also allowed in favor of a widow's paraphernalia. See 2 Bl. Com. 436. Thus, if the paraphernalia had been actually taken by creditors in satisfaction of their debts, the widow will be allowed to stand in their place, and the assets will be marshaled so as to give her a compensation *pro tanto*. *Aldrich v. Cooper*, 8 Ves. 397; *Inledon v. Northcote*, 3 Atk. 438; 2 Lead. Cas. Eq. 69. So, heirs at law and devisees are, in a variety of cases, entitled to a marshaling of assets in their favor; as, where an heir or devisee of real estate is sued by a bond creditor, he may, in many cases, be entitled to stand in the place of such specialty creditor against the personal estate of the deceased testator or intestate. *Galton v. Hancock*, 2 Atk. 424. And see this subject fully discussed, 2 Lead. Cas. Eq. 215, *et seq.*

In closing this subject it may be observed, that generally in this country courts of probate have jurisdiction over the administration of estates, and courts of equity do not ordinarily interfere, except in aid of the former. It would seem, however, that in some of the States, courts of equity have concurrent jurisdiction with courts of probate, over many matters connected with the settlement of estates. See *Clarke v. Johnston*, 2 Stockt. (N.

J.) 287; *Seymour v. Seymour*, 4 Johns. Ch. 409. In England, when a matter of administration of an estate once comes into the courts of equity, it draws the whole administration with it, and the final settlement is made in that court. *Stewart v. Stewart*, 31 Ala. 207; *Adams v. Adams*, 22 Vt. 50; and see *Thompson v. Brown*, 4 Johns. Ch. 619, 630; *McKay v. Green*, 3 id. 58; *Colbert v. Daniel*, 32 Ala. 329.

CHAPTER XV.

ASSIGNMENTS.

ARTICLE I.

OF THE GENERAL RULES RELATING TO ASSIGNMENTS.

Section 1. Assignments in general. By the term *assignment*, as used in common parlance, is understood a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. 1 Bouv. Dict. 165. In a more technical and restricted sense, an assignment is the transfer of the interest one has in lands and tenements, and is usually applied to an estate for *life or years*. See, 1 Broom & Had. 753, Wait's ed.; 2 Bl. Com. 326; 3 Woodd. Lect. 170; 1 Steph. Comm. 485; Cruise Dig., tit. XXXII (Deed), ch. vii, § 15. So, the term is employed to denote not only the *act* of transfer, but also the *instrument* by which the transfer is effected.

A very extensive class of assignments are those made by debtors for the benefit of creditors. They are for the most part regulated by statute in nearly all the States of the Union, and do not, therefore, come within the scope of this work. It is merely proposed to give the general rules of law which regulate the transfer of rights in action, without regard to the kind of property or the purposes of the transfer.

ARTICLE II.

WHAT IS ASSIGNABLE.

Section 1. In general. To make a grant or assignment valid *at law*, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment. *Needles v. Needles*, 7 Ohio St. 432; *Mitchell v. Winslow*, 2 Story, 630; *Thalhimer v. Brinckerhoff*, 3 Cow. (N.Y.) 623; *Moody v. Wright*, 13 Metc. (Mass.) 17; *Skipper v. Stokes*, 42 Ala. 255. But courts of equity will support an assignment not only of interests in action and contingency, but of things which have no present actual or potential existence, but rest in mere possibility only (*Calkins v.*

Lockwood, 17 Conn. 154; *Stover v. Eycleshimer*, 4 Abb. Ct. App. [N. Y.] 309; 3 Keyes, 620), provided the agreement is fairly entered into, and it would not be against public policy to uphold it. *Field v. Mayor, etc., of New York*, 6 N. Y. (2 Seld.) 179. Thus, it is held that the assignment of the head-matter and whale-oil to be caught in a whaling voyage now in progress will be valid in equity, and will attach to the head-matter and oil when obtained. *Mitchell v. Winslow*, 2 Story, 630. And see *Taylor v. Palmer*, 31 Cal. 240; *Tyler v. Barrows*, 6 Robt. (N. Y.) 104; *Groot v. Story*, 41 Vt. 533; *St. Louis v. Clemens*, 42 Mo. 69; *Lansden v. McCarthy*, 45 id. 106.

The assignment of a *chose in action* was prohibited at common law. *Thallhimer v. Brinckerhoff*, 3 Cow. 623; *Coolidge v. Ruggles*, 15 Mass. 387. The only exception to the rule being in favor of the King. *United States v. Buford*, 3 Pet. (U. S.) 30. This rule, though still having a nominal existence, serves no other purpose than to merely give form to some legal proceedings, while in equity it is totally disregarded. *Thallhimer v. Brinckerhoff*, 3 Cow. 623. And the doctrine of equitable assignments has been gradually extending to meet the convenience of trade and business, and has been favorably viewed in the courts of law, subject, however, to the legal principle, that in such cases the assignee can enforce his claim only in the name of the assignor, unless there be an express promise by the debtor to pay the assignee. Under this limitation *choses in action* generally may be the subject of an assignment; and the debts which are contingent, and money yet to become due, may well be assigned, these circumstances only operating to postpone the liability of the debtor until the contingency happens and the money becomes payable. *Gibson v. Cooke*, 20 Pick. (Mass.) 17. And see *Haskell v. Hilton*, 30 Me. 419; *Dix v. Cobb*, 4 Mass. 511; *Welch v. Mandeville*, 1 Wheat. (U. S.) 236; *Smilie v. Stevens*, 41 Vt. 321.

§ 2. **Lands, and interests in lands.** Every estate and interest in lands and tenements, and also every present and certain estate or interest in incorporeal hereditaments may be assigned. Coke Litt. 46 b. Thus, the interests of a purchaser (*Ensign v. Kellogg*, 4 Pick. [Mass.] 1; *Halbert v. Deering*, 4 Litt. [Ky.] 9; *Brown v. Chambers*, 12 Ala. 697); mortgagor (*Bigelow*, 1 Pick. 485); lessor (*Willard v. Tillman*, 2 Hill [N. Y.], 274; see *Thacker v. Henderson*, 63 Barb. 271; *Demarest v. Willard*, 8 Cow. 206); mortgagee, lessee and tenant for life, are assignable (see *Graham v. Newman*, 21 Ala. 497; *Outcalt v. Van Winkle*, 1 Green's Ch.

[N. J.] 513); so are the profits of lands. See *Cochran v. Paris*, 11 Gratt. (Va.) 348; *Robinson v. Mauldin*, 11 Ala. 977.

In Georgia, it is held that an estate at will growing out of the statute of frauds is assignable; though, if created by the act of the parties under the common law, it is not. *Cody v. Quarterman*, 12 Ga. 386. Rent yet to grow due is assignable. *Demarest v. Willard*, 8 Cow. 206. So, where a preference to enter lands has been acquired by occupancy and possession, the right of entry or occupancy is assignable (*Smith v. Rankin*, 4 Yerg. [Tenn.] 1); as is also a right of entry where the breach of the condition *ipso facto* terminates the estate. *Ensign v. Kellogg*, 4 Pick. 1; *Gwynn v. Jones*, 2 Gill & J. (Md.) 173; *Warner v. Bennet*, 31 Conn. 468. The right to cut trees, which have been sold on the grantor's land (*McCoy v. Herbert*, 9 Leigh [Va.] 548; *Olmstead v. Niles*, 7 N. H. 522), and the right to *betterments* are likewise assignable. *Lombard v. Ruggles*, 9 Me. 62.

Warrants and surveys of land may be assigned in Virginia, but entries merely cannot (*Morrison v. Campbell*, 2 Rand. 206), though it is otherwise in Kentucky. *Hart v. Benton*, 3 Bibb, 420; *id.* 534. A widow may assign her interest in her deceased husband's estate, and such assignment is sufficient, in equity, to pass such interest to the assignees. *Powell v. Powell*, 10 Ala. 900; see *Johnson v. Shields*, 32 Me. 424.

A pre-emption right has been held not assignable (*Whitney v. Buckman*, 13 Cal. 536); but the general grant of a mining privilege in land passes an estate to the grantee, which he may assign. *McBee v. Loftis*, 1 Strobb. Eq. (S. C.) 90; see *Hoy v. Smith*, 49 Barb. 360; *Gaston v. Plum*, 14 Conn. 344.

The assignment of a contract to convey an interest in real estate, upon the performance of certain conditions, vests an equitable interest therein in the assignee, which will be protected and made available by courts of law. *Dyer v. Burnham*, 25 Me. 9; and see *Brayton v. Garvin*, 5 Wis. 117.

The interest which a son has as heir of his father's estate, the father being alive, may be the subject of sale, and a court of equity will recognize the validity of such sale and enforce it, when the vendor's right attaches, as an assignment of the property, if it appears that the transaction was fair, and for a valuable consideration. *Fitzgerald v. Vestal*, 4 Sneed (Tenn.), 258. And see *Nimmo v. Davis*, 7 Tex. 26.

§ 3. **Contracts.** A contract is held to be assignable only when the entire interest therein can pass by the assignment, both legal

and equitable. *White v. Buck*, 7 B. Monr. (Ky.) 546. A contract to plant a certain area of land, and sell all the crop raised, is held assignable by the buyer, without the assent of the seller. *Sears v. Conover*, 4 Abb. Ct. App. (N. Y.) 179; 3 Keyes, 113; 33 How. 324. So, among assignable contracts or agreements are the following: A contract by one person to serve another for a certain length of time. *M'Kee v. Hoover*, 1 T. B. Monr. (Ky.) 32; see *Davenport v. Gentry*, 9 B. Monr. (Ky.) 427; *Hayes v. Willio*, 4 Daly (N. Y.), 259. An agreement for the delivery of property. *Lafferty v. Rutherford*, 5 Ark. 649; *Tyler v. Barrows*, 6 Rob. (N. Y.) 104. Or to pay a certain sum of money to a defendant, if he will withdraw his defense. *Gray v. Garrison*, 9 Cal. 325. Or to perform work upon a street. *Taylor v. Palmer*, 31 id. 240. Or not to run boats on a certain line of travel. *Steam Navigation Co. v. Wright*, 6 id. 258. A contract for grading, curbing, and macadamizing a street. *St. Louis v. Clemens*, 42 Mo. 69. A contract for the labor of convicts. *Horner v. Wood*, 23 N. Y. (9 Smith) 350. A contract on which personal representatives can sue. *Sears v. Conover*, 34 Barb. 330; 4 Abb. Ct. App. 179; 3 Keyes, 113; 33 How. 324. A written promise of indemnity, whether under seal or not. *Fletcher v. Piatt*, 7 Blackf. (Ind.) 522. A part interest in a written contract. *Groves v. Ruby*, 24 Ind. 418. The balance due upon a mutual account. *Bartlett v. Pearson*, 29 Me. 9. A claim for breach of contract. *Monahan v. Story*, 2 E. D. Smith (N. Y.), 393. Or, a policy of insurance, in equity, and every set-off between insurer and insured, prior to the assignment, is good against the assignee. *Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 268; *Guordon v. North America Ins. Co.*, 3 Yeates (Penn.), 327; *Carroll v. Boston Mar. Ins. Co.*, 8 Mass. 515; see *Jones v. Alley*, 17 Minn. 292. An assignment of wages to be earned, made in good faith and for a valuable consideration, is valid. And it is held to be immaterial that the work is being done without any special contract as to time; an understanding that the employee should continue in the service of the employer as previously, is sufficient. *Augur v. New York Belting and Packing Co.*, 39 Conn. 536; and see *Garland v. Harrington*, 51 N. H. 409; *Sharp v. Edgar*, 3 Sandf. (N. Y.) 379; *Emery v. Lawrence*, 8 Cush. (Mass.) 151; *Leahy v. Dugdale*, 27 Mo. 437. The moment a man has acquired an exclusive interest in any thing, though it shall be but a contingent and executory interest, he may dispose of it, if not forbidden by law. *Graham v. Henry*, 17 Tex. 164. But the assignment of a mere expectation of earn-

ing money, if there is no contract on which to found the expectation, is of no effect. See *Mulhall v. Quinn*, 1 Gray, 105. Though such an assignment may be made valid by a ratification of it, after the money has been earned. *Farnsworth v. Jackson*, 32 Me. 419.

An assignment of an alien author's right to the first printing and publication of a manuscript within the United States is valid, and the right is within the cognizance of a court of equity. *Palmer v. De Witt*, 47 N. Y. (2 Sick.) 532; S. C., 7 Am. Rep. 480; see *Shook v. Daly*, 49 How. (N. Y.) 366.

§ 4. Money due, or to become due. A creditor may assign his debt to a third person, and give him the benefit of any pledge which he holds to secure the payment of such debt. *Chapman v. Brooks*, 31 N. Y. (4 Tiff.) 75. So, an unliquidated balance of an account is a proper subject of assignment. *Wescott v. Potter*, 40 Vt. 271; *Crocker v. Whitney*, 10 Mass. 316. And the same is true of a debt for goods sold, etc., of which the evidence rests on an account. *Cook, Woodbridge v. Perkins*, 3 Day (Conn.), 364; *Dix v. Cobb*, 4 Mass. 511; *Norris v. Douglass*, 5 N. J. L. (2 South.) 817; or of a debt evidenced by a note. *Long v. Constant*, 19 Mo. 320.

The claim of a sheriff, for services which have been rendered, and expenses which have been incurred in the execution of process, is assignable. *Birkbeck v. Stafford*, 23 How. (N. Y.) 236; S. C., 14 Abb. 285. And a city officer who is chosen for a year, subject to be removed from office at any time, at the will of the mayor and aldermen, and whose salary is payable quarterly, may legally make an assignment of a quarter's salary before the quarter expires. *Brackett v. Blake*, 7 Metc. (Mass.) 335; and see *State Bank v. Hastings*, 15 Wis. 75; *Thayer v. Kelley*, 28 Vt. 20. So costs due the clerk of a court are assignable in equity. *Ciples v. Blair*, Rice's Ch. (S. C.) 60; and a turnpike company may, in equity, assign the money due them for subscriptions. *Miller v. Malony*, 3 B. Monr. (Ky.) 105.

A judgment and execution may be assigned so as to vest an equitable interest in the assignee, which the law will protect. *Brown v. Maine Bank*, 11 Mass. 153; *Pearson v. Talbot*, 4 Litt. (Ky.) 435; *Brahan v. Ragland*, 3 Stew. (Ala.) 247; *Vanhouten v. Reily*, 14 Miss. (6 Smed. & M.) 440; see *Tutt v. Couzins*, 50 Mo. 152.

§ 5. Causes of action. We have already seen (*ante*, 356, § 1,) that by the common law mere *choses in action* are not assign-

able. But this is a formal difficulty only, for the assignment of a chose in action is valid in equity, and courts of law will take notice of equitable assignments to protect them, and will allow the assignee to maintain an action thereon in the name of the assignor. See *ante*, art 2, § 1, and cases there cited. The assignor, by the assignment, gives authority to the assignee to use his name in any legal proceedings which may become necessary to give full effect to the assignment. The assignor becomes the trustee of the assignee. *Eastman v. Wright*, 6 Pick. (Mass.) 316. See, also, *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34; *Welch v. Mandeville*, 1 Wheat. (U. S.) 236. *Chose in action*, taken in its broadest latitude, comprehends not only a demand arising on contract, but also a wrong or injury done to property or person. See *Gillet v. Fairchild*, 4 Denio (N. Y.), 80; *People v. Tioga C. P.*, 19 Wend. 75. But for the purposes of any sort of assignment, legal or equitable, the term is generally restricted to a claim due either on contract, or to a claim that some special damage has arisen to the estate of the assignor. *Id.* And see *McKee v. Judd*, 12 N. Y. (2 Kern.) 625; *Davis v. Herndon*, 39 Miss. 484; *Jordon v. Gillen*, 44 N. H. 424.

A right of action for the conversion of personal property has been held assignable. *McKee v. Judd*, 12 N. Y. (2 Kern.) 625; *Lazard v. Wheeler*, 22 Cal. 139; *Webber v. Davis*, 44 Me. 147; *Hawk v. Thorn*, 54 Barb. (N. Y.) 164; but see *Dunklin v. Wilkins*, 5 Ala. 199; *Davis v. Herndon*, 39 Miss. 484. So a claim for money obtained by fraudulent representations is assignable. *Byzbie v. Wood*, 24 N. Y. (10 Smith) 607; *Allen v. Brown*, 51 Barb. (N. Y.) 86; *Stewart v. Balderson*, 10 Kans. 131; as is likewise a cause of action for the recovery of damages upon an undertaking on arrest. *Moses v. Waterbury Button Co.*, 37 N. Y. Superior Ct. 393. A right of action against a common carrier for negligence in not delivering goods; *Smith v. N. Y. & New Haven R. R. Co.*, 28 Barb. (N. Y.) 605; or for the loss of goods; *Freeman v. Newton*, 3 E. D. Smith (N. Y.) 246; or to recover the value of property intrusted to him, may be assigned; *Merrill v. Grinnell*, 30 N. Y. (3 Tiff.) 594; and the right of action, which a carrier has for an injury to the goods of a third person, injured while in his possession, is assignable; *Merrick v. Brainard*, 8 Barb. (N. Y.) 574. The lien of a material-man or mechanic is assignable; *Tuttle v. Howe*, 14 Minn. 145; and a cause of action to enforce a mortgage survives to the personal representatives, and is, therefore, assignable; *Marvin v. Inglis*, 39 How. (N. Y.) 329;

and see *Waldron v. Willard*, 17 N. Y. (3 Smith) 466; *Zabriskie v. Smith*, 13 N. Y. (3 Kern.) 322; *Freeman v. Newton*, 3 E. D. Smith (N. Y.), 130.

The assignment of part of a note, which is being at the time sued upon, is valid, and will not be vitiated by a subsequent assignment of the rest of the note to other parties. *Gardner v. Smith*, 1 Heisk. (Tenn.) 256.

ARTICLE III.

WHAT IS NOT ASSIGNABLE.

Section 1. In general. In general, mere personal torts, which die with the party, and do not survive to his personal representatives, are incapable of passing by assignment. *Comegys v. Vasse*, 1 Pet. (U. S.) 193; *Grant v. Ludlow*, 8 Ohio St. 1; *Linton v. Hurley*, 104 Mass. 353; *Norton v. Tuttle*, 60 Ill. 130; *McGlinchy v. Hall*, 58 Me. 152. And assignments that are illegal or against public policy will not be sustained at law or in equity. Thus, an assignment by a judge of his salary. *Flarty v. Odum*, 3 Term. R. 681; see *State Bank v. Hastings*, 15 Wis. 78; or an assignment by an officer in the army or navy of his pay, or of his commission. *Id.*; *Wells v. Foster*, 8 M. & W. 149; *Collyer v. Fallon*, 1 Turn. & Russ. 459, will not be supported. And an assignment of the future earning or salaries of an officer or employee of the United States government, in consideration of payment in advance, is void not only as against public policy, *Bliss v. Lawrence*, 58 N. Y. (13 Sick.) 442; S. C., 48 How. (N. Y.) 21; but also as in direct contravention of act of Congress. *Billings v. O'Brien*, 45 How. (N. Y.) 392; S. C., 14 Abb. (N. S.) 238; 4 Daly, 556. So, the assignment of claims against the United States in certain cases is prohibited by statute. *Danklessen v. Braynard*, 3 Daly (N. Y.), 183; *Becker v. Sweetser*, 15 Minn. 427. And the bare right to file a bill in equity growing out of the perpetration of a fraud on a party is not assignable, being contrary to public policy and savoring of the character of maintenance. The assignor must have a substantial right, and not a mere naked right to upset a legal instrument or to maintain a suit. *Norton v. Tuttle*, 60 Ill. 130; *Morrison v. Deaderick*, 10 Humph. (Tenn.) 342; *Milwaukee, etc., R. R. Co. v. Milwaukee, etc., R. R. Co.*, 20 Wis. 174; *Prosser v. Edmonds*, 1 Younge & Coll. 418; *Marshall v. Means*, 12 Ga. 61.

It is held that contracts for the performance of personal duties or services are not assignable by the employer. *Hays v. Willio*, 4 Daly (N. Y.), 259; *Davenport v. Gentry*, 9 B. Monr. (Ky.) 427. So, where a contract is founded in personal trust and confidence, the assignee thereof cannot recover upon it without the consent of the party contracting with his assignor, to the assignment. *Lansden v. Mc Carthy*, 45 Mo. 106; *Fairgrievies v. Lehigh Co.*, 2 Phil. (Penn.) 182. But see *Groot v. Story*, 41 Vt. 533; *Taylor v. Palmer*, 31 Cal. 240. And it is held, that a note or bond, payable wholly or partly in personal services, is not assignable. *Henry v. Hughes*, 1 J. J. Marsh. (Ky.) 454; *Bothick v. Purdy*, 3 Mo. 82; *Ransom v. Jones*, 2 Ill. (1 Scam.) 291. So, in case of a deed, conditioned for the support of a person in old age, the interest of neither party is assignable without the consent of the other. *Bethlehem v. Annis*, 40 N. H. 34.

A parol license to be exercised on the land of another is a mere personal trust and confidence, and is not assignable. *Cowles v. Kidder*, 24 N. H. (4 Fost.) 364; *Mendenhall v. Klinck*, 51 N. Y. (6 Sick.) 246; nor is a license to keep a grocery, assignable. *Lewis v. United States*, 1 Morr. (Iowa) 199; *Munsell v. Temple*, 8 Ill. (3 Gilm.) 92. But it is held that a permit to cut logs from the State lands may be assigned as security for supplies already advanced, or to be furnished at a subsequent time. *Mason v. Sprague*, 47 Me. 18.

ARTICLE IV.

FORM AND MODE OF ASSIGNING.

Section 1. In general. It was held formerly that the instrument of transfer must be of as high a nature as the instrument transferred; for instance, that an assignment of an instrument under seal must be by deed. *Wood v. Partridge*, 11 Mass. 488.

But this rule is no longer observed in all its strictness, if at all, and there may now be a valid assignment of a contract by a mere transfer of the evidence of the contract. *Dunn v. Snell*, 15 Mass. 481; *Prescott v. Hull*, 17 Johns. 284; *Porter v. Bullard*, 26 Me. 448; *Cotten v. Williams*, 1 Fla. 37; *Sexton v. Fleet*, 2 Hilt. (N. Y.) 477; *Doremus v. Williams*, 4 Hun (N. Y.), 458. But in order to constitute an assignment, either in law or equity, there must be such an actual or constructive appropriation of the subject-matter assigned, as to confer a complete and present

right on the assignee; and this, even where the circumstances do not admit of its immediate exercise. *Id.*; *Ford v. Garner*, 15 Ind. 298. And a mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund is not an assignment of the fund even in equity. *Id.*; *Christmas v. Russell*, 14 Wall. (U. S.) 69. But an order drawn upon a particular fund, or for the payment of particular money in the hands of the drawee, not otherwise appropriated, followed by notice of such order, to the drawee, is an equitable assignment of the money of the drawer in the hands of the drawee, to the amount of such order. *Lewis v. Berry*, 64 Barb. (N. Y.) 593; *Conway v. Cutting*, 51 N. H. 407. See *Noe v. Christie*, 51 N. Y. (6 Sick.) 270; *Rodick v. Gandell*, 1 De G., M. & G. 763; S. C., 15 Eng. Law & Eq. 22. See *Risley v. Smith*, 39 N. Y. S. C. 137; *Alger v. Scott*, 54 N. Y. (9 Sick.) 14.

An assignment of a mortgage by an individual or by a corporation, without seal, is a valid transfer of the mortgage debt. *Runyan v. Mersereau*, 11 Johns. 534; *Gillett v. Campbell*, 1 Denio (N. Y.), 520. But see *Prescott v. Ellingwood*, 23 Me. 345.

So a judgment may be assigned by parol, or writing without seal (*Ford v. Stuart*, 19 Johns. [N. Y.] 342; *Becton v. Ferguson*, 22 Ala. 599); and the same is true of an obligation or covenant. *Morange v. Edwards*, 1 E. D. Smith (N. Y.), 414; *Howell v. Bulkley*, 1 Nott & M. (S. C.) 250; *Dawson v. Coles*, 16 Johns. (N. Y.) 51. See *Arnold v. Barrow*, 2 Patt. & H. (Va.) 1. The delivery of a note, bill, or execution, with intent to transfer the debt on a fair bargain upon valuable consideration, is, in general, a sufficient assignment of the note, bill, or judgment (*Clark v. Rogers*, 2 Me. 147; *Jones v. Whitter*, 13 Mass. 304; *Tutt v. Cousins*, 50 Mo. 152; *Rollison v. Hope*, 18 Tex. 446); and so of other choses in action. *Onion v. Paul*, 1 Harr. & J. (Md.) 114; *Noyes v. Brown*, 33 Vt. 431; *Porter v. Bullard*, 26 Me. 448; *Garnsey v. Gardner*, 49 id. 167; *Grover v. Grover*, 24 Pick. (Mass.) 261; *Briggs v. Dorr*, 19 Johns. (N. Y.) 95; *Robinson v. Williams*, 3 Head (Tenn.), 540. And a contract in writing to convey land (*Currier v. Howard*, 14 Gray [Mass.], 511), or a book debt, may be assigned verbally. *Spafford v. Page*, 15 Vt. 490.

No particular form is necessary in equity to constitute an assignment, and courts of equity give effect to assignments in many cases where they would not be sustained at common law. See *Clemson v. Davidson*, 5 Binn. (Penn.) 392; *Morton v. Naylor*, 1 Hill (N. Y.), 583; *Hoppiss v. Eskridge*, 2 Ired. Eq. (N. C.) 54.

Under the New York Code of Procedure, an assignment, valid as an equitable assignment, is equally valid at law. *Hooker v. Eagle Bank*, 30 N. Y. (3 Tiff.) 83.

ARTICLE V.

VALIDITY OF ASSIGNMENT AS TO ASSIGNOR'S CREDITORS.

Section 1. In general. In order that an assignment of a *chose in action* may be valid as against the creditors of the assignor, it must be *bona fide*, and upon adequate consideration; and a mere formal transfer is insufficient for the purpose. *Giddings v. Coleman*, 12 N. H. 153; *Langley v. Berry*, 14 id. 82. See *Lonsdale's Estate*, 29 Penn. St. 407; *Jones v. Drake*, 6 Phil. (Penn.) 416; *Cunningham v. Freeborn*, 11 Wend. (N.Y.) 241; *D' Wolf v. Pratt*, 42 Ill. 198.

ARTICLE VI.

RIGHTS OF ASSIGNEE.

Section 1. In general. An assignment of a *chose in action* does not pass to the assignee a legal right to the security or debt, but merely vests in him an equitable interest, which the courts of law will protect. *Garland v. Richeson*, 4 Rand. (Va.) 266; *Day v. Whitney*, 1 Pick. (Mass.) 504; *Sloan v. Summers*, 14 N. J. L. (2 Green) 510; *Upton v. Wallace*, 44 Vt. 522. After the assignment, the assignor will not be permitted to defeat the rights of the assignee, whether the assignment be good at law or only in equity. *Kimball v. Huntington*, 10 Wend. (N. Y.) 675; *Chapman v. Haley*, 43 N. H. 300; *Blin v. Pierce*, 20 Vt. 25. The rule under this head is briefly stated to be, that the assignee acquires the rights, neither more nor less, of the assignor, and stands in his exact position. The assignor can transfer no better right than that of which he is possessed. *Gray v. Thomas*, 18 La. Ann. 412; *Jack v. Davis*, 29 Ga. 219; *Smith v. Rogers*, 14 Ind. 224; *Wilson v. Bowden*, 26 Ark. 151; *Bush v. Lathrop*, 22 N. Y. (8 Smith) 535; *Ely v. McNight*, 30 How. (N. Y.) 97; *Shotwell v. Weeb*, 23 Miss. 375.

An assignee of a demand is the proprietor of, and may release it. *Dade v. Herbert*, 1 Cranch (C. C.), 85; *Pate v. Gray*, Hempst. 155; but a release by an assignor of his assignee's claim, is a nullity. *Parker v. Kelley*, 18 Miss. 184.

By the assignment of a right all its accessories pass with it. Thus, an assignment of a debt carries with it by implication, and as an incident to the principal subject, any collateral security which the creditor may hold for the enforcement of it. *Hurt v. Wilson*, 38 Cal. 263; *Raintan v. Harding*, 3 Phil. (Penn.) 449; *Waller v. Tate*, 4 B. Monr. (Ky.) 529; *Cathcart's Appeal*, 13 Penn. St. 416; *Lindsey v. Bates*, 42 Miss. 397. And the assignment of a judgment for a debt carries the debt, and if the debt be secured by mortgage, it carries also the mortgage interest. *Ib.*; *Bolen v. Crosby*, 49 N. Y. (4 Sick.) 183. So, if the assignment be of only part of the judgment, a proportionate interest in the mortgage passes. *Pattison v. Hull*, 9 Cow. (N. Y.) 747. A transfer or assignment of a promissory note secured by mortgage carries with it all the rights of the mortgage, and the privileges given to secure it. *Perot v. Levasseur*, 21 La. Ann. 529. And when a note secured by a lien is assigned, the lien is also assigned. *Forwood v. Dehoney*, 5 Bush (Ky.), 174; *Guy v. Butler*, 6 id. 508; *Perry v. Roberts*, 30 Ind. 244. So, an assignment of a bond, which is secured by a collateral mortgage or deed of trust, passes the collateral. *Miller v. Hoyle*, 6 Ired. Eq. (N. C.) 269. And upon the assignment of a bond and mortgage, a guaranty of collection, given by a previous assignor, passes as incident to the debt, although not, in terms, transferred with the principal obligations. *Craig v. Parkis*, 40 N. Y. (1 Hand) 181; and see *Smith v. Starr*, 6 N. Y. S. C. (T. & C.) 387; S. C., 4 Hun, 123. An assignment of goods at sea and their proceeds is sufficient to pass a legal title to the proceeds. *Hodges v. Harris*, 6 Pick. (Mass.) 359; *Arnold v. Elwell*, 13 Me. 261. And an assignment of a claim on a steamboat, for supplies furnished, carries with it the statutory lien on the boat. *Strother v. Hamburg*, 11 Iowa, 59. In general, an assignment of a particular claim passes to the assignee all remedies and liabilities which the assignor had to secure and recover it, though they are not specifically mentioned in the assignment. *Mehaffy v. Share*, 2 Penn. 361.

The assignment of a judgment and execution passes all interest in the further enforcement of the judgment, but not in the money which the sheriff has previously collected on it. *Robinson v. Towns*, 30 Ga. 818. Nor does the assignment of a bond for a deed of lands invest the assignee with the right to rents, which have already accrued, without something showing that it was intended to transfer them (*Van Driel v. Rosierz*, 26 Iowa, 575); though it is otherwise as to the rents accruing after the

assignment. *Ib.* Costs, being only an incident of a verdict, will not pass by an assignment which does not pass the verdict. *Lawrence v. Martin*, 22 Cal. 173.

ARTICLE VII.

LIABILITIES OF ASSIGNEE.

Section 1. In general. It is the general and well-established rule, that an assignee of a demand or right in action, negotiable instruments only excepted, holds subject to all equities, burdens and offsets which existed at the time of the assignment, against the assignor. *Faull v. Tinsman*, 36 Penn. St. 108; *Walker v. Johnson*, 13 Ark. 522; *Timms v. Shannon*, 19 Md. 296; *State Mutual Fire Ins. Co. v. Roberts*, 31 Penn. St. 438; *Conoon v. Van Mater*, 15 N. J. L. (3 Green) 481; *Blydenburg v. Thayer*, 1 Abb. Ct. App. (N. Y.) 156; *Martin v. Richardson*, 68 N. C. 255; *Parrish v. Brooks*, 4 Brewst. (Penn.) 154. And the rule has been held applicable to the assignment of a bond (*Scott v. Shreeve*, 12 Wheat. 605), a mortgage (*Ingraham v. Disborough*, 47 N. Y. [2 Sick.] 421; *Eitel v. Bracken*, 38 Super. Ct. [N. Y.] 7), and a judgment (*Jordan v. Black*, 2 Murph. [N. C.] 30; *Colquit v. Bonner*, 2 Ga. 155). So it applies to the title of an assignee from an assignee; he takes subject to the equities between the original assignor, and the first assignee. *Cutts v. Guild*, 57 N. Y. (12 Sick.) 229; *Metzgar v. Metzgar*, 1 Rawle (Penn.), 227; *Clute v. Robinson*, 2 Johns. (N. Y.) 595; see *Downey v. Tharp*, 63 Penn. St. 322.

ARTICLE VIII.

RIGHTS OF ASSIGNOR.

Section 1. In general. A party, equitably entitled to a chose in action, may sue for it in the name of the assignor when necessary, and the court will protect him against any acts of the nominal plaintiff designed to defeat the suit. But the assignor is entitled to an indemnity against the costs of a suit thus brought. *Farnsworth v. Sweet*, 5 N. H. 267; *Anderson v. Miller*, 7 Smedes & M. (Miss.) 586; *Gordon v. Drury*, 20 N. H. 353.

ARTICLE IX.

LIABILITY OF ASSIGNOR.

Section 1. In general. An assignee cannot hold the assignor liable, on account of an offset set up against the assigned demand, unless he has given the assignor notice of such offset. *Drayton v. Thompson*, 1 Bay (S. C.), 265. And the doctrine that the vendor of chattels in possession impliedly warrants the title, extends to choses in action. *Swanzy v. Parker*, 50 Penn. St. 450; *Ledwich v. McKim*, 53 N. Y. (8 Sick.) 307; *Giffert v. West*, 33 Wis. 617.

Every obligee or holder of an obligation who assigns it to another, especially if he does so for a valuable consideration, impliedly at least, thereby engages that it is genuine and binding upon the obligor, unless he discloses fully and truly to the assignee, in treating for the assignment, all the facts and circumstances connected with the execution and delivery of the obligation. After being thus advised, the assignee agrees to take it at his own risk. *Stroh v. Hess*, 1 W. & S. (Penn.) 153. If the assignee of a bond cannot recover it from the obligor by reason of the consideration of it having failed before the assignment of it was made, he may recover back from the assignor the money he paid for the assignment, whether he holds his guaranty or not; and the assignee's right of action accrues immediately. *Flynn v. Allen*, 57 Penn. St. 482; *Stewart v. West*, 14 id. 336. So upon the sale of a note and mortgage, the maker of which is known by both parties to be insolvent, if the vendor represents the mortgage to be good as an inducement to the vendee to buy, and the latter buys relying upon such representation, but the mortgagor has in fact no title to the mortgaged premises, the vendor is liable to the purchaser for the consideration paid. *Hahn v. Doolittle*, 18 Wis. 196.

The vendor of a bill of exchange or promissory note, whether the transfer be by indorsement or delivery, impliedly warrants that it is genuine and not a forgery, and that it is of the kind and description it purports to be. *Murray v. Judah*, 6 Cow. (N. Y.) 484; *Merriam v. Wolcott*, 3 Allen (Mass.), 258; *Bell v. Cafferty*, 21 Ind. 411; *Thompson v. McCullough*, 31 Mo. 224. And the vendor, though no party to the bill, is responsible for its genuineness (*Thrall v. Newell*, 19 Vt. 202; *Gurney v. Wormersley*, 28 Eng. L. & Eq. 256); and if the name of the party is

forged and the bill becomes valueless, he is liable to the vendee as upon a failure of consideration. *Id.* See *Baxter v. Duren*, 29 Me. 434. If an indorsement turns out to be forged, the seller will be held liable to the vendee for what he has received from him with interest from the receipt thereof. *Aldrich v. Jackson*, 5 R. I. 218. See a full discussion of this subject under head of Bills and Notes.

ARTICLE X.

ACTION AT LAW BY ASSIGNEE.

Section 1. In general. In England, any instrument or claim, though not negotiable, may be assigned to the king, who can sue on it in his own name. *Master v. Miller*, 4 T. R. 320, 340; *Thalhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623. And no valid objection is perceived against giving the same effect to an assignment to the government in this country. *United States v. Buford*, 3 Pet. (U. S.) 13, 30. But the general common-law rule applicable to a chose in action not negotiable is, that if assigned, an action at law thereon must be brought in the name of the assignor, except where the defendant has expressly promised the assignee to respond to him (*Skinner v. Somes*, 14 Mass. 107; *Jessel v. Williamsburgh Ins. Co.*, 3 Hill [N. Y.], 88; *Innes v. Dunlop*, 8 T. R. 595); and every thing which might have been shown in defense against the assignor may be used against the assignee. *Wood v. Perry*, 1 Barb. (N. Y.) 114; *Bartlett v. Pearson*, 29 Me. 9, and see cases cited *ante*, 366, art. 7. In many of the States of the Union choses in action have been made legally assignable by statute, thereby enabling an assignee, like the indorsee of a negotiable security, to enforce the demand in his own name. See *Hooker v. Eagle Bank*, 30 N. Y. (3 Tiff.) 83; *Doremus v. Williams*, 4 Hun (N. Y.), 458; *Dobyns v. McGovern*, 15 Mo. 662; *Carpenter v. Johnson*, 1 Nev. 331; *Mills v. Murry*, 1 Neb. 327; *Allen v. Miller*, 11 Ohio, 374; *McDonald v. Kneeland*, 5 Minn. 352; *Andrews v. Rue*, 34 N. J. L. 402; *Russell v. Petree*, 10 B. Monr. (Ky.) 184; *Fletcher v. Piatt*, 7 Blackf. (Ind.) 522; *White v. Tucker*, 9 Iowa, 100; *Stewart v. Balderston*, 10 Kans. 131; *Long v. Heinrich*, 46 Mo. 603. But the power thus given to sue in the assignee's name does not affect the *rights* of the parties. The equities in defense are not excluded. *Myers v. Davis*, 22 N. Y. (8 Smith) 489. The statute merely enables an assignee to maintain an action in his own name, in those cases in which the right was previously

assignable at law or in equity. See *Purple v. Hudson, etc.*, 4 Duer (N. Y.), 74; *McMahon v. Allen*, 34 Barb. (N. Y.) 56; S. C., 12 Abb. 275. The nature of an assignment itself is not altered. *Cox v. Sprigg*, 6 Md. 274.

In the absence of a statute regulating assignments, where one in good faith and for a valuable consideration has assigned all his interest in a chose in action, the assignee may use the name of the assignor in a suit to enforce his right whenever that is necessary. And the assignor cannot control the suit, and his admissions made subsequent to the assignment and after notice will not be received to defeat it. *Halloran v. Whitcomb*, 43 Vt. 306. See *Sweptson v. Harvey*, 69 N. C. 387. But the rule that the *bona fide* assignee of a chose in action will be protected against the release of the nominal plaintiff, executed after notice to the defendant, is held not to apply where the assignee has by fraudulent assertions and devices concealed the true relations of the parties. *Atkinson v. Runnells*, 60 Me. 440; *Randall v. Howard*, 2 Black, 285.

ARTICLE XI.

ACTION IN EQUITY BY ASSIGNEE.

Section 1. In general. As a general rule, a court of equity will not entertain a suit brought by the assignee of a debt, or a chose in action, which is a mere legal demand; but will leave him to his remedy at law, by an action in the name of the assignor. If, however, special circumstances render it necessary for the assignee to come into a court of equity, for relief, to prevent a failure of justice, he will be allowed to bring suit in his own name upon a mere legal demand. *Tiernan v. Jackson*, 5 Pet. 598; *Townsend v. Carpenter*, 11 Ohio, 21; *Ontario Bank v. Mumford*, 2 Barb. Ch. (N. Y.) 596; *Taylor v. Reese*, 44 Miss. 89.

In most cases, *bona fide* assignments will be upheld in courts of equity, but champerty and maintenance, and the purchase of lawsuits, are inquired into and restrained in equity as at law, and fraud will defeat an assignment. See *Anderson v. Van Alen*, 12 Johns. 342; *Edwards v. Parkhurst*, 21 Vt. 472; *Schaferman v. O'Brien*, 28 Md. 565; *Fetrow v. Merriwether*, 53 Ill. 275; *Rowe v. Beckett*, 30 Ind. 154; *Martin v. Veeder*, 20 Wis. 466; *Martin v. Clarke*, 8 R. I. 389.

The assent of the debtor is not necessary in equity to give validity to the assignment. *Spring v. South Carolina Ins. Co.*,

8 Wheat. 268, but he should at once have notice of the assignment, in order to save the rights of the assignee, in case of a *bona fide* payment to the assignor, or subsequent assignee, without notice. *Jones v. Witter*, 13 Mass. 304; *Ward v. Morrison*, 25 Vt. 593; see *Hamilton v. Marks*, 52 Mo. 78. Notice given by procurement of the assignee is sufficient. *Baron v. Porter*, 44 Vt. 587. And see *Kellogg v. Krauser*, 14 Serg. & R. (Penn.) 137; *Meghan v. Mills*, 9 Johns. 64; *Dale v. Kimpton*, 46 Vt. 76.

The assignment of a chose in action is not defeated by the death of the assignor. In such case the assignee is entitled to the aid, and may use the name of the executor or administrator of the assignor. *Dawes v. Boylston*, 9 Mass. 337. On the other hand, if an executor promise an assignee of a claim against the testator, to pay it, in consideration of the assignment and of assets, he is personally liable. *Id.*; *Cutts v. Perkins*, 12 id. 281.

By the assignment of a chose in action, an equitable and moral obligation to pay the assignee is imposed upon the debtor, which is held a good consideration for an express promise, sufficient to authorize a suit in the assignee's own name. *Lang v. Fiske*, 2 Fairf. (Me.) 385; *Currier v. Hodgdon*, 3 N. H. 82; *Coolidge v. Ruggles*, 15 Mass. 387; *Barger v. Collins*, 7 Harr. & J. (Md.) 213. And, in such a suit, the debtor is not entitled to avail himself of the set-off of any claims against the assignor. *Thompson v. Emery*, 27 N. H. 269. So, it is held to make no difference whether the contract assigned be a specialty (*Compton v. Jones*, 4 Cow. [N. Y.] 9), or a debt founded upon an express or implied promise by parol, as for goods sold or services performed, or whether the assignment is to the assignee for his own benefit or the benefit of creditors. In either case the assignee may maintain the action in his own name against the debtor. *Clark v. Thompson*, 2 R. I. 146.

The rule that the assignee of a chose in action may maintain an action thereon in the name of the assignor applies to a sealed instrument (*Sater v. Hendershott*, 1 Morris [Iowa], 118), and special authority to bring suit is not required. *Ib.* Nor is an assignee required to show a right in himself; he is bound only to show a right to recover in the plaintiff on the record, for it is this right alone that can be enforced. *Hamilton v. Brown*, 18 Penn. St. 87; *Saltmarsh v. Bower*, 22 Ala. 221. If a person having a demand due him assigns parts of it to different persons, a court of equity has jurisdiction of a suit by one of the assignees, to collect his part of the demand. *Field v. Mayor, etc., of N. Y.*, 6 N. Y. (2 Seld.) 179.

It has been held that the debtor may offset a demand against the assignee, although suit is brought in the name of the assignor. *Corser v. Craig*, 1 Wash. (C. C.) 424. But he cannot offset a demand held by him at the time of the assignment, if he had notice from the assignee that assignment was about to be made, and he did not then disclose such demand. *King v. Fowler*, 16 Mass. 397. So, in general, his conduct may be such as in equity to deprive him of the right of set-off. *Kemp v. McPherson*, 7 Harr. & J. (Md.) 320.

A valid assignment of a policy of insurance, by consent of the underwriters, or otherwise, vests in the assignee all the rights of the assignor, legal and equitable, including that of action; but the instrument, being non-negotiable in its character, is assignable only in equity, and an action by the assignee must, at the common law, be brought in the name of the assignor. See *Jessel v. Williamsburg Ins. Co.*, 3 Hill (N. Y.), 88; *Pollard v. Somerset Mut. Fire Ins. Co.*, 42 Me. 221; *State Mut. Fire Ins. Co. v. Roberts*, 31 Penn. St. 438. The only interest which passes by an assignment of a policy *after* a loss has occurred, and after the insurers have been served with notice thereof and with the preliminary proofs, is the claim or debt which the insured holds against the insurers for the amount of the loss. Hence, such an assignment is not a breach of a condition in the policy that the interest of the assured, in the policy, is not assignable unless by the written consent of the insurers; and that in case of any transfer or termination of such interest without such consent, the policy shall from thenceforth be void. *Carroll v. Charter Oak Ins. Co.*, 38 Barb. 402; S. C. again, 40 id. 292; S. C. affirmed, 1 Abb. Ct. App. (N. Y.) 316; see *Shearman v. Niagara Fire Ins. Co.*, 46 N. Y. (1 Sick.) 526; S. C., 7 Am. Rep. 380. And it seems that a provision in a policy prohibiting a transfer of the interest of the assured *after* loss would be illegal and void. *Courtney v. New York City Ins. Co.*, 28 Barb. 116; *Curroll v. Charter Oak Ins. Co.*, 38 id. 402.

ARTICLE XII.

FRAUDULENT ASSIGNMENTS.

Section 1. In general. It is the policy of the law to protect creditors against any acts or contracts by the debtor to their injury, whether operating as direct frauds, or merely as constructive frauds. To this end the English statute of 13 Eliz. ch. 5, was passed, declaring all conveyances of goods and chattels not made

bona fide, and upon good consideration, but in trust for the use of the person conveying them, or made to hinder, delay, or defraud creditors, to be void. The essential provisions of this statute have been generally adopted throughout the United States. See 2 Kent's Com. 440; *Robinson v. Holt*, 39 N. H. 537; though they have been considered as only declaratory of the common law, which, in the opinion of Lord MANSFIELD, was so strong against fraud, that it alone would have attained every end proposed by this statute, and the statute of 27 Elizabeth, enacted for the protection of subsequent purchasers against prior fraudulent alienations of the same property. *Cadogan v. Kennett*, Cowp. 434; and see *Adams v. Broughton*, 13 Ala. 731; *Whittlesy v. McMahon*, 10 Conn. 138; *Whitmore v. Woodward*, 28 Me. 392; *Hamilton v. Russell*, 1 Cranch (U. S.), 316; *Gardner v. Cole*, 21 Iowa, 205; see *Mayor of Baltimore v. Williams*, 6 Md. 235; *Brown v. Burke*, 22 Ga. 574. But although the last-mentioned statute has been often held affirmative of the common law, yet it may be regarded as a settled principle that it extends only to conveyances of real estate. Its provisions extend not to goods and chattels, because the possession of these, which is ever supposed to accompany the transfer of them, is a notorious evidence of title, and sufficient to guard subsequent purchasers from the danger of suffering by prior voluntary conveyances of them. *Sewall v. Glidden*, 1 Ala. 52; *Teasdale v. Atkinson*, 2 Brev. (S. C.) 48. All the doctrines of the courts of law and equity, concerning the voluntary settlements of real estates, and the presumptions of fraud arising from them, are, however, held applicable to chattels; and a gift of them is equally fraudulent and void against existing creditors. 2 Kent's Com. 440; *Bayard v. Hoffman*, 4 Johns. Ch. (N. Y.) 450. The full discussion of this subject will appropriately fall under the head of Statute of Frauds, which see.

CHAPTER XVI.

ASSUMPSIT.

TITLE I.

OF THE ACTION OF ASSUMPSIT, AND WHEN IT MAY OR
MAY NOT BE MAINTAINED.

ARTICLE I.

NATURE AND DEFINITION OF.

Section 1. In general. *Assumpsit*, in the law of contracts, is an undertaking, either express or implied, to perform a parol agreement. 1 Bouv. Dict. 159. It is the undertaking or promise upon which the action of *assumpsit* may be brought. *Milward v. Ingram*, 2 Mod. 43. *Express assumpsit* is an undertaking made orally, or by writing not under seal, to perform an act or to pay a sum of money to another. *Implied assumpsit* is an undertaking presumed in law to have been made by a party from his conduct, although he has not made any express promise. 1 Bouv. Dict. 159. But, in reference to this latter species of *assumpsit*, or promise, it has been said, "that the notion of promises in law is a metaphysical notion, for the law makes no promise but where there is a promise of the party" (Lord Holt, in *Starke v. Cheeseman*, 1 Ld. Raym. 538); and the only real distinction between an express undertaking and one implied in law would seem to be in regard to the mode of proof, which properly belongs to the law of evidence. See, *ante*, 72, 73, 74, § 4.

In practice, *assumpsit* is a form of action given by law to a party injured by the breach or non-performance of a parol or simple contract legally entered into. See *Rann v. Hughes*, 7 T. R. 351, *note*; *Ballard v. Walker*, 3 Johns. Cas. 60; *Ward v. Warner*, 8 Mich. 508. It lies upon contracts, either express or implied; and as the law always implies a promise or contract to do that which a party is legally bound to perform, the action will be found to be of very extended application. See, *ante*, p. 73; 1 Chitt. Pl. 98, 99; *McCloskey v. Miller*, 72 Penn. St. 151;

Force v. Haines, 17 N. J. (Law) 385. "The breach of all simple contracts, whether verbal or written, express or implied, for the payment of money, or for the performance or omission of any other act," is said to be remediable by action of assumpsit. 1 Chitt. Pl. 111, 112. It is technically an action on the case (*Carter v. White*, 32 Ill. 509), deriving its name from the emphatic Latin word of the clause formerly used in the writ and declaration, expressive of the defendant's undertaking. See 1 Chitt. Pl. 111, 112. In some of the older books it is called an "action upon the case upon *assumpsit*." See Comyn's Dig. In *assumpsit*, damages alone are the object of the action, and the action differs from the action of *debt*, in this, that the amount claimed need not be liquidated (*Rann v. Hughes*, 7 T. R. 351, *note*; *Rudder v. Price*, 1 H. Bla. 547, 551. See *Moses v. Macferlan*, 2 Burr. 1008); and it also differs from *covenant*, in this, that it does not require a contract under seal to support it, and will not lie upon any contract under seal. *Ib.* *North v. Nichols*, 37 Conn. 375; *Slade's Case*, 4 Coke R. 92, *b*; *Toussaint v. Martinnant*, 2 T. R. 100. It is a general rule that *assumpsit* will not lie where there is a remedy of a higher nature. *Baber v. Harris*, 9 Ad. & El. 532; *Schlenker v. Moxsy*, 3 Barn. & C. 789; Selw. N. P. 55. It is, however, said to be a liberal and equitable action, applicable to almost every case where money has been received, which, in equity and good conscience, ought to be refunded. *Thompson v. Thompson*, 5 W. Va. 190.

§ 2. **Promise.** In order to support *assumpsit* there must be a promise or undertaking on the part of the defendant, express or implied, for a promise or contract is of the very gist of the action. *Wings v. Brown*, 12 Rich. (S. C.) 279; *Winston v. Francisco*, 2 Wash. (Va.) 187; *Lanchester v. Frewer*, 2 Bing. 361; *Candler v. Rossiter*, 10 Wend. 487.

§ 3. **Consideration.** Every promise, for the non-performance of which an action of *assumpsit* may be maintained, must, however, be founded on a sufficient consideration. *Nudum pactum*, or an agreement to do or pay any thing on one side, without any compensation on the other, is wholly void in law, it being a maxim in the common law of England, as well as in the civil law, that *ex nudo pacto non oritur actio*. See Broom's Leg. Max. 745. Thus, if a man promises another to give him so much money on a future day, or to build a house, without consideration, this is a naked promise, and will not oblige. Bac. Abr., Assump. C. So, an agreement to remain with a person for the

purpose of learning a trade or business, is not binding, unless such person has bound himself to teach it, or there be some other consideration for it. *Lees v. Whitcomb*, 5 Bing. 34. And so of a promise to pay the debt of a person illegally arrested, in consideration of his being set at liberty. *Atkinson v. Settree*, Willes, 482. However binding in honor and conscience such a promise may be, it does not create a legal responsibility. See *Elsee v. Gatward*, 5 T. R. 143, 149; *Balfé v. West*, 76 Eng. Com. Law (13 C. B.) 466. But any act of the plaintiff from which the defendant derives a benefit or advantage, or any labor, detriment or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, is a sufficient consideration, if such act is performed, or such inconvenience suffered, by the plaintiff with the consent, either express or implied, of the defendant. 1 Selw. N. P. 55; and see *Hulse v. Hulse*, 84 Eng. Com. Law (17 C. B.) 711; *Davis v. Nisbett*, 100 id. (10 C. B. N. S.) 752; *Haigh v. Brooks*, 10 Ad. & El. 309; *Child v. Morley*, 8 T. R. 610. For a full discussion of the subject of consideration, see *ante*, 90, chap. II, art. VI.

It has been sometimes held that it is necessary that the consideration on which the promise of the defendant is founded should move from the plaintiff, or, in other words, that there must be a privity of contract between the plaintiff and the defendant; and if the plaintiff be a stranger to the consideration, he cannot maintain *assumpsit*. See *Crow v. Rogers*, 1 Str. 592; *Price v. Easton*, 4 B. & Ad. 433; *Shear v. Overseers of Hillsdale*, 13 Johns. 495; *Cabot v. Haskins*, 3 Pick. 83, 92. But we have seen, *ante*, 103, 104, that a different rule now prevails. A consideration altogether executed and past, is not sufficient to maintain an *assumpsit*; though if it were moved by a precedent request, it is good, and amounts to a binding promise, *ante*, 109, 110. Bac. Abr., Assump., D. See *Osborne v. Rogers*, 1 Wms. Saund. 264, n; *King v. Sears*, 2 Cr. M. & R. 48; *Hopkins v. Logan*, 4 Mees. & W. 241.

ARTICLE II.

SPECIAL OR GENERAL ASSUMPSIT.

Section 1. Special assumpsit. We have seen that *assumpsit* lies upon every kind of simple contract, whether express or implied. *Ante*, art. 1, § 1. Corresponding to this distinction in contracts as express or implied, the action of *assumpsit* may

be divided into *special* and *general* assumpsit. *Special assumpsit* is an action brought upon the express contract or promise of the defendant. This is the ground of the action, and unless the plaintiff can show that he has fulfilled, with legal sufficiency and exactness, all the terms of the contract, he can recover nothing. See *Cutler v. Powell*, 2 Smith's Lead. Cas. (7th Am. ed.) 61; *Dermott v. Jones*, 23 How. 231; S. C., 2 Wall. 1, 9; *Morford v. Mastin*, 6 Monr. (Ky.) 609; S. C., 3 J. J. Marsh. 89; *Gregory v. Mack*, 3 Hill (N. Y.), 380; *Robertson v. Lynch*, 14 Johns. 451; *Taft v. Inhabitants of Montague*, 14 Mass. 282; *Russell v. Gilmore*, 54 Ill. 147; *Catholic Bishop of Chicago v. Bauer*, 62 id. 188. If, however, the performance on the part of the plaintiff has been according to the terms of the contract, and has resulted in an available and practicable work of the kind required, so that he is capable of maintaining his special action at all, he is entitled, at common law, to recover the whole compensation fixed by the contract, and the defendant must resort to a cross action, to recover damages for faults in the manner of performance, or for breaches of a warranty. *Cutler v. Powell*, 2 Smith's Lead. Cas. (7th Am. ed.) 61; *Everett v. Gray*, 1 Mass. 101. See Recoupment. A recovery in such case may, of course, be defeated by proof of fraud; for fraud vitiates every contract into which it enters. See *Dermott v. Jones*, 2 Wall. 1, 9. But where performance has been accepted upon a contract of sale, the defendant is not at liberty to set up the defense of fraud, unless he has returned the article, or given notice of the defect when discovered. If he retains the property, he cannot treat the sale as void (*Burton v. Stewart*, 3 Wend. 236) unless the thing sold was absolutely worthless, and the plaintiff could not possibly have been injured by its non-return. Id.; *Van Epps v. Harrison*, 5 Hill (N. Y.), 63; *Kase v. John*, 10 Watts (Penn.), 107; *Thornton v. Wynn*, 12 Wheat. 183. It follows that on a sale, special assumpsit can only be defeated for fraud where the article has been returned, or is proved to be wholly worthless. Id.; *Cutler v. Powell*, 2 Smith's Lead. Cas. (7th Am. ed.) 61, 63, 64.

§ 2. *General assumpsit*. The action of *general assumpsit* rests on wholly different ground from that of *special assumpsit*, and is brought upon the promise or contract implied by law in certain cases. It results, however, from the nature of the action, that when the plaintiff declares generally, the defendant may show in reduction of damages, every thing that goes directly to the con-

sideration, and immediately affects the value of the work; for the *assumpsit* which the law implies, whether in *quantum meruit*, or *indebitatus*, is always commensurate with the actual final value of the article or work. *Id.*; and see *Basten v. Butter*, 7 East, 479; *Farnsworth v. Garrard*, 1 Camp. 38; *Mondel v. Steele*, 8 M. & W. 858; *Rigge v. Burbidge*, 15 *id.* 598; *King v. Paddock*, 18 Johns. 141; *Grant v. Button*, 14 *id.* 377; *Heck v. Shener*, 4 Serg. & R. (Penn.) 249. So it is well established by the American authorities, that when the plaintiff brings general *assumpsit*, when there has been a special contract, the defendant may give in evidence in reduction of damages, a breach of warranty, or a fraudulent misrepresentation, without a return of the article. *Culver v. Blake*, 6 B. Monr. (Ky.) 528; *Mixer v. Coburn*, 11 Metc. (Mass.) 559, 561; *Steigleman v. Jeffries*, 1 Serg. & R. 477; *McAllister v. Reab*, 4 Wend. 483; S. C. affirmed, 8 *id.* 109; *Batterman v. Pierce*, 3 Hill (N. Y.), 172; see *Draper v. Randolph*, 4 Harr. (Del.) 454, 456; *Henning v. Van Hook*, 8 Humph. (Tenn.) 678, 681.

ARTICLE III.

WHEN THE ACTION LIES.

Section 1. In general. It is proposed in this place to notice some of the cases in which the action of *assumpsit* will lie, without regard to the form of the action as *general* or *special*. Thus, it may be stated generally, that the action lies on promises to pay or repay money, or to do or forbear some other act; as, for goods sold and delivered; for work and labor; use and occupation, and the like; for money lent or money paid; for money had and received, and on an account stated. Each of these subdivisions will be fully treated of under distinct heads in this work, and need not, therefore, be further enlarged upon in this connection.

Assumpsit is held to be the proper remedy for the breach of a contract under seal, where the performance has been enlarged by parol. *Smith v. Smith*, 45 Vt. 433; and see *Baird v. Blagrove*, 1 Wash. (Va.) 170. And the general rule is, that, for money accruing due under the provisions of a statute, the action may be supported, unless another remedy is expressly given. *Parolet v. Sandgate*, 19 Vt. 621; *Hillsborough v. Londonderry*, 43 N. H. 451. And see *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 238; *Bath v. Freeport*, 5 Mass. 326. And the action

will lie for goods and chattels (*Falmouth v. Penrose*, 6 B. & C. 358); as for tobacco, where the contract is for the payment of tobacco. *Marshall v. McPherson*, 8 Gill. & J. (Md.) 333. See, also, *Hill v. Wallace*, Add. (Penn.) 145. And where one legatee receives money belonging to another, *assumpsit* lies to recover it. *Durdon v. Gaskell*, 2 Yeates (Penn.), 268. So, the fees of a justice of the peace, appearing by his docket, may be recovered in *assumpsit* for work and labor, and are earned when judgment is recovered. *Harris v. Christian*, 10 Penn. St. 233. It also lies for breach of warranty, express or implied, in the sale or exchange of chattels (*Timrod v. Shoolbred*, 1 Bay. [S. C.] 324; *Hillman v. Wilcox*, 30 Me. 170; *Evertson v. Miles*, 6 Johns. 138; *Kimball v. Cunningham*, 4 Mass. 505; *Russell v. Gillmore*, 54 Ill. 147); or for the breach of a contract of bailment (*Bank of Mobile v. Huggins*, 3 Ala. 206); or to recover for the labor of servants (*Janes v. Buzzard*, Hempst. 240); or to recover the whole of an account, though *covenant* might have been maintained upon some of the items thereof (*State v. Jennings*, 10 Ark. 428); or to recover the amount of a bill of exchange, given for the price of goods (*Sweeny v. Willing*, 6 Mo. 174); or to recover the consideration money for land sold. *Shepard v. Little*, 14 Johns. 210; *Wood v. Gee*, 3 McCord (S. C.), 421. So, it will lie on a balance struck, and a promise to pay money due on a specialty, on a new consideration (*Miller v. Watson*, 7 Cow. 39; *Gilson v. Stewart*, 7 Watts [Penn.], 100); on an express promise by a devisee to pay a specific sum charged on the land devised (*Kelsey v. Deyo*, 3 Cow. 133; *Tole v. Hardy*, 6 id. 333); on a promise to pay a debt barred by the statute of limitations (*Young v. Mackall*, 3 Md. [Ch.] 398); for unpaid installments of a subscription to the stock of an incorporated company (*Barrington v. Pittsburgh, etc., R. R. Co.*, 34 Penn. St. 358); or to recover from a bailee for hire, the value of goods and chattels delivered to him, and which he has converted to his own use. *Barker v. Cory*, 15 Ohio, 9. And see *Gilmore v. Wilbur*, 12 Pick. 120; *Guthrie v. Wickliffe*, 1 A. K. Marsh. (Ky.) 83; *King v. McDaniel*, 4 Call (Va.), 451; *Johnson v. Reed*, 8 Ark. 202.

Assumpsit lies against a husband or father for necessary supplies furnished to his wife or child, whom he is bound to support, and has refused or neglected to supply, notwithstanding his protestations against his liability (*Van Valkinburgh v. Watson*, 13 Johns. 480; *Hunt v. Thompson*, 3 Scam. [Ill.] 179; *Bainbridge v. Pickering*, 2 Wm. Bla. 1325); also, against execu-

tors for taxes due from their testators (*Bulkley v. Clark*, 2 Root [Conn.], 60); against a common carrier, to recover the value of goods coming to his possession by his tortious act, and which have been destroyed while in his custody (*Cooper v. Berry*, 21 Ga. 526); against a collector, for taxes collected by him (*Commissioners v. Harrington*, 1 Blackf. [Ind.] 260); against an attorney for negligence in transacting the business of his profession (*Church v. Mumford*, 11 Johns. 479; *Stimpson v. Sprague*, 6 Me. 471; *Ellis v. Henry*, 5 J. J. Marsh. [Ky.] 248); against a bailiff, of goods on a general promise to account (*Canfield v. Merrick*, 11 Conn. 425); against a company for goods furnished (*Cram v. Bangor House*, 12 Me. 354); against the alienee of a purchaser, or other person accepting land expressly charged with the payment of money, as the means of enforcing payment out of the land (*De Haven v. Bartholomew*, 57 Penn. St. 126); against a moneyed corporation for refusing to permit a transfer of its stock upon the books of the corporation, when such a transfer is necessary to give validity to the transaction (*Kortwright v. Buffalo Commercial Bank*, 20 Wend. 91; S. C. affirmed, 22 id. 348); against an administrator for a distributive share in the *residuum* of the testator's estate (*Holloback v. Van Buskirk*, 4 Dall. 147); or against one who acquiesces in and implicitly sanctions an act of another, done on his account, which act, if done by himself, would amount to an undertaking in law (*Miller v. Creyon*, 2 Brev. [S. C.] 108); and it lies to recover upon bonds made by a municipal corporation in aid of a railroad. *Town of Queensbury v. Culver*, 19 Wall. 83, 92, 93.

Assumpsit will likewise lie by an assignee of a pretended demand, if he was induced to pay money in consideration of the assignment by false and fraudulent representations that the demand was valid, to recover back the sum paid (*Burton v. Driggs*, 20 Wall. 125, 136); by one partner against his copartner, for money paid him, over and above his proportion of the profits, on dissolution and adjustment of the partnership concerns (*Bond v. Hays*, 12 Mass. 34; *Williams v. Henshaw*, 11 Pick. 79); by the purchaser of an article stolen by the vendor which is reclaimed by the owner, for the purchase-money; although the vendor has not been tried for the theft (*Barton v. Faherty*, 3 Iowa, 327); by a tenant in common against his cotenant who has received more than his share of the profits of the property owned in common (*Dyer v. Wilbur*, 48 Me. 287; *Jones v. Harraden*, 9 Mass. 450; see *Dresser v. Dresser*, 40 Barb.

300); or where he receives the whole amount of damages assessed for land, owned in common and taken for public use (*Brinckerhoff v. Wemple*, 1 Wend. 470), or where he has sold the common property, and received all the money. *Coles v. Coles*, 15 Johns. 159; *Gardiner Manuf. Co. v. Heald*, 5 Me. 381. So, it will lie by an assignee of bank shares, against the bank, for a wrongful refusal to issue to him a certificate of such shares (*Hill v. Pine River Bank*, 45 N. H. 300); and it will lie for work done under a sealed contract, though not done according to such contract, if accepted by him for whom it was done (*Watchman v. Crook*, 5 Gill & J. [Md.] 240); or against a defendant in an execution, through whose instrumentality the property of a third person has been levied upon and sold, to satisfy a debt against himself. *Hackley v. Swigert*, 5 B. Monr. (Ky.) 86. So, it lies for tolls (*Quincy Canal v. Newcomb*, 7 Metc. [Mass.] 276; *Central Bridge Corporation v. Abbott*, 4 Cush. 473; *Seward v. Baker*, 1 T. R. 626); or by a broker for his commissions in procuring a charter-party for a vessel (*Bruce v. Parsons*, 12 Cush. 591); or against an innkeeper for the loss of baggage through the negligence of his servant or agent (*Bradish v. Henderson*, 1 Dane Abr. 310; *Dickinson v. Winchester*, 4 Cush. 115); or where the respective claims of part owners of a vessel are liquidated, to recover the balance due to either (*Chadbourne v. Duncan*, 36 Me. 89); or where there is an express agreement to pay rent, to recover it; without proving occupancy of the premises leased (*Stier v. Surget*, 18 Miss. 154); and where a person accepts a deed-poll containing a reservation of certain duties to be performed by the grantee, *assumpsit* lies for the breach of those duties. *Newell v. Hill*, 1 Metc. (Mass.) 117; *Guild v. Leonard*, 18 Pick. 511.

Where a contract for the sale of land is executed by a conveyance of the land, *assumpsit* will lie for the purchase-money (*Butler v. Lee*, 11 Ala. 885; *Shephard v. Little*, 14 Johns. 210; *Goodwin v. Gilbert*, 9 Mass. 510); and the acknowledgment of payment, contained in the deed, is not conclusive evidence to defeat the action. *O'Neale v. Lodge*, 3 Harr. & M. (Md.) 433; *Watson v. Blaine*, 12 Serg. & R. (Penn.) 131; *Bowen v. Bell*, 20 Johns. 338; *Wilkinson v. Scott*, 17 Mass. 249. But the action cannot be maintained if the conveyance is not made until after the action is commenced. *Butler v. Lee*, 11 Ala. 885; see *Gordon v. Phillips*, 13 id. 565. If two buy land, and it is sold again for their mutual benefit, *assumpsit* may be sustained by one of them

to recover his share of the price. *Brubaker v. Robinson*, 3 Penn. 295. And where two partners agree with the third that, in consideration of his retiring from the concern, and surrendering to them his interest in the partnership effects, they will pay a particular debt, the creditor may recover against the two in *assumpsit*, as if the promise had been made to him. *Bellas v. Fagely*, 19 Penn. St. 273. So, where a gift *causa mortis* was made to two, and was converted by the administrator of the deceased, *assumpsit* was held the proper remedy, and the plaintiffs in such case should join in the action. *Michener v. Dale*, 23 id. 59.

Where several persons agree together in an instrument of writing to contribute money for the purchase of certain land, and for the erection of mills thereon, and some of them proceed and accomplish the undertaking, they may recover in *assumpsit* of a party refusing to contribute the sum subscribed by him. *Pillsbury v. Pillsbury*, 20 N. H. 90. And a person who subscribes for the stock in a corporation is liable in *assumpsit* to the corporation for the sum so subscribed. *Stokes v. Turnpike Co.*, 6 Humph. (Tenn.) 241. So, an agreement to take and fill a given number of shares in an incorporated company is equivalent to an agreement to take and pay for such shares, and *assumpsit* will lie upon it for the stipulated price of the shares. *Penobscott v. Dunn*, 39 Me. 587; *Bangor Bridge Co. v. McMahon*, 10 id. 478; *Ogdensburgh, Rome & Clayton R. R. Co. v. Frost*, 21 Barb. 541.

In the case of an adjustment of accounts between a *cestui que trust* and his trustee, and a promise on the part of the latter to pay the amount ascertained to be due, the former may maintain *assumpsit* for its recovery. *Nelson v. Howard*, 5 Md. 327. But where the amount is undetermined, and there has been no promise of payment by the trustee, a court of equity alone has jurisdiction. Id. See *Dias v. Brunell*, 24 Wend. 9.

Assumpsit also lies in favor of the heirs at law to recover against the administrator, the rents and profits of the real estate of a deceased insolvent debtor. *Kimball v. Sumner*, 62 Me. 305. And it will lie if the defendant refuse to convey to the plaintiff specified property, agreeably to an award of arbitrators, within the time limited therefor. *Gerry v. Eppes*, 62 id. 49. So, when there is a legal duty enjoined by competent authority upon a municipal corporation, *assumpsit* may be maintained to enforce its performance. *Farwell v. Rockland*, 2 id. 296. And, if a

person, to save his property from being sold on legal process, pays a debt which another is legally bound to pay, he may maintain an action against such other person upon an implied *assumpsit*. *Nichols v. Buckram*, 117 Mass. 488.

§ 2. **General indebitatus assumpsit, when proper.** The form of the action of *assumpsit* known as *general*, or *indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation. But such a promise must always be expressly charged in the declaration, and unless so alleged the action cannot be maintained. *Curtis v. Fiedler*, 2 Black, 461, 478; *United States v. Russell* 13 Wall. 623, 630; *Candler v. Rossiter*, 10 Wend. 487. See, *ante*, art. II, § 2.

But although *indebitatus assumpsit* is founded upon an implied promise, and while it is true that there is no liability by implication of law upon an express contract, executory in its provisions, yet if there has been full performance, and nothing remains to be done but the payment of the money, or, if there has been only part performance, and the remainder has been waived or prevented, and the work performed has been accepted, a recovery may be had for the contract price of the service performed, under an *indebitatus assumpsit*. *Catholic Bishop of Chicago v. Bauer*, 62 Ill. 188. And see, generally, in support of this doctrine, *Cutter v. Powell*, 2 Smith's Lead. Cas. 23, 27; *id.* (7th Am. Ed.) 22, 49; *Pordage v. Cole*, 1 Wms. Saund. 320, *note*; *Peeters v. Opie*, 2 *id.* 352, *note*; *Ohio Canal Co. v. Knapp*, 9 Pet. 541, 566; *Dermott v. Jones*, 2 Wall. 1; *Balt. & Ohio R. R. v. Potty*, 14 Gratt. (Va.) 447; *Allen v. McNew*, 8 Humph. (Tenn.) 46; *Felton v. Dickinson*, 10 Mass. 287; *Ridgley v. Crandall*, 4 Md. 441; *Carson v. Allen*, 6 Dana (Ky.), 395; *Stout v. St. Louis Tribune Co.*, 52 Mo. 342. So, where work done under a special agreement is not finished at the time agreed upon, but is proceeded in afterward, with the assent of the party for whom the work is being done, *indebitatus assumpsit* lies to recover for the work done; and if neither party be the faulty cause of delay, the recovery will be according to the rate of compensation fixed by the contract. *Merrill v. Ithaca, etc., R. R. Co.*, 16 Wend. 586; *Dillon v. Masterton*, 7 Jones & Sp. (N. Y.) 133. But if the delay be caused by the defendant, with a design to hinder the plaintiff's performance of the agreement,

who, nevertheless, proceeds, until, in despair, he finally abandons the work, he is not confined to such rate of compensation, but may recover as much as his labor is worth. *Id.*; *Hoagland v. Moore*, 2 Blackf. (Ind.) 167.

If there is an express agreement, and it contains nothing more than the law will imply, an action may be sustained on the implied agreement. Thus, although a surety may have a special promise of indemnity, not under seal, from the principal, yet if he has paid the demand for which he was surety, he may sue for indemnity in *indebitatus assumpsit*. *Gibbs v. Bryant*, 1 Pick. (Mass.) 118; *M'Williams v. Willis*, 1 Wash. (Va.) 199. So, if both parties have departed from an express agreement the law raises an implied one. As where A agreed to deliver stones to B, to be paid for half in money and half in goods, and the stones were delivered by A, and some of the goods were delivered by B, and B sued and recovered for those goods, it was held that A might recover for the stones in *indebitatus assumpsit*. *Goodrich v. Lafflin*, 1 Pick. 57; and see *Raymond v. Bearnard*, 12 Johns. 274; *Fitch v. Sargeant*, 1 Ohio, 352. Where one of the parties to a contract dies, unless his death terminates the contract, it is the duty of his legal representative to carry the contract out, and in case of his neglect or refusal to do so, the other party may treat the contract as rescinded and sue the representative in general *indebitatus assumpsit*. *Miller v. Thompson*, 22 Ark. 258. The law holds parties strictly to the terms of their contracts. If a party, by his contract, charges himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse him. *Paradine v. Jayne*, *Alleyne*, 27; *Beal v. Thompson*, 3 Bos. & P. 420; *Beebe v. Johnson*, 19 Wend. 500. If unexpected impediments lie in the way, and a loss must ensue, the law leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated. *Dermott v. Jones*, 2 Wall. 1; *Cutter v. Powell*, 2 Smith's Lead. Cas. (7th Am. Ed.) 55, 56.

Among the numerous cases in which the action of *assumpsit*, in the form of *indebitatus assumpsit*, has been maintained, are the following: To recover money advanced upon a special con-

tract which has been rescinded. *Jenkins v. Thompson*, 20 N. H. 457; and see *Kimball v. Cunningham*, 4 Mass. 504; *Byers v. Bostwick*, 2 Treadw. (S. C.) 75; *Dubois v. Delaware, etc., Co.*, 4 Wend. 285; to recover back money paid by a purchaser, on a parol contract, for real estate, where the vendor or his heirs are unable or fail to perform their part of the contract. *Barickman v. Kuykendall*, 6 Blackf. (Ind.) 22; to recover the price of land sold and conveyed to the defendant. *Siltzell v. Michael*, 3 Watts & Serg. 329; see *ante*, 380; to recover for extra work not embraced in a special contract, and done upon the subject of that contract. *Powel v. Buckley*, 13 Mo. 317; *Bachelder v. Bickford*, 64 Me. 526; to recover money agreed to be paid for owelty, on a parol partition of lands. *Walter v. Walter*, 1 Whart. (Penn.) 292; to recover the wages of a seaman, who had signed shipping articles, was taken sick while in the defendant's service, and was unable to rejoin the ship. *Sykes v. Summerel*, 2 Browne (Penn.), 225; after a settlement of accounts, to recover for an item of indebtedness omitted by mistake on the settlement. *Sage v. Hawley*, 16 Conn. 106; or, between near relatives, to recover for board and maintenance, on proof of an express promise, or an actual understanding in respect to payment therefor. *Cannon v. Windsor*, 1 Houst. (Del.) 143; see *Chapman v. Rich*, 63 Me. 588. So, general *assumpsit* is held to lie on an express, as well as on an implied promise. *Snyder v. Castor*, 4 Yeates (Penn.), 353; upon a judgment of a justice of the peace. *Green v. Fry*, 1 Cranch (C. C.), 137; but not in New York. *Andrews v. Montgomery*, 19 Johns. 162; nor in North Carolina. *Bain v. Hunt*, 3 Hawks (N. C.), 572. It will lie against a sheriff for money received on execution by himself or his deputy. *Overtton v. Hudson*, 2 Wash. (Va.) 172; but see *Armstrong v. Garrow*, 6 Cow. 465; and to recover back over-payments made on the note of a third person in its absence, upon the holder's agreement to refund any excess. *Stipp v. Johnston*, 68 Ill. 176. So, in the case of a contract for the sale, at \$24,000, of a livery stable, together with the exclusive privilege of furnishing the guests of a certain hotel with carriage-hire, the vendor falsely representing that he had such privilege, and that it alone was worth \$5,000, the contract was held to be severable, and that *indebitatus assumpsit* would lie to recover back the last-mentioned sum. *Reybold v. Henry*, 3 Houst. (Del.) 279.

Where work is done for A, at the request of B, *indebitatus assumpsit* may be maintained against B. *Clark v. Roop*, 15

Ark. 172. So, upon an agreement that a seller shall receive specific articles in payment for goods sold, and the defendant fails to deliver the articles according to agreement, this form of the action lies against him for goods sold. *Baylies v. Fethypluce*, 7 Mass. 325, 329. And the holder of a note payable in labor or specific goods, in a suit against a payee, who has passed it with the indorsement "pay the bearer," may declare in general *assumpsit*. *Elkinton v. Fennimore*, 13 Penn. St. 173. Likewise, if a creditor for goods sold, etc., take a chose in action for collateral security, and payment has not been obtained from it, he may recover in *indebitatus assumpsit*, and is not obliged to resort to an action on the special agreement under which the security was received. *Leas v. James*, 10 Serg. & R. (Penn.) 307.

A memorandum promising to pay money "as soon as a crop could be sold or the money raised from any other source," was held not to be a promissory note or special agreement such that the plaintiff, by putting it in evidence, precluded himself from recovering in *indebitatus assumpsit* upon an account stated. *Nunez v. Dautel*, 19 Wall. 560.

§ 3. When special assumpsit lies. In general, except as stated in the preceding section, if there be an open or unperformed special agreement, special *assumpsit* must be brought thereon. *Maynard v. Tidball*, 2 Wis. 34; *Western v. Sharp*, 14 B. Monr. (Ky.) 177; *Sherman v. New York Central Railroad Co.*, 22 Barb. 239; *Geer v. Brown*, 11 Rich. (S. C.) 42. See *Weiss v. Mauch Chunk, etc., Railroad Co.*, 58 Penn. St. 295; *Norris v. Durham*, 9 Cow. 151; *Butterfield v. Seligman*, 17 Mich. 95. It has been held that where, under an express contract, payment is to be made, partly or wholly, by specific articles, the declaration should be special for a failure to deliver such articles. *Bradley v. Levy*, 5 Wis. 400; *Bernard v. Dickens*, 22 Ark. 351; and see *Weart v. Hoagland*, 2 Zab. (N. J.) 518; *Mitchell v. Gile*, 12 N. H. 390; *Fitch v. Casey*, 2 Iowa, 301; *Harrison v. Luke*, 14 M. & W. 138. But see *Clark v. Fairchild*, 22 Wend. 576. So, there must be a special count to try an express or an implied warranty. *Fowler v. Williams*, 2 Brev. (S. C.) 304; *Russell v. Gillmore*, 54 Ill. 147; *Markley v. Withers*, 4 T. B. Monr. (Ky.) 15. And a special count is necessary where the plaintiff claims damages for the non-performance of an executory agreement, and the breach sounds in damages merely. *Vincent v. Rogers*, 30 Ala. 471; and see *Outwater v. Dodge*, 7 Cow. 85; and a promise to board the plaintiff for a certain time must be

specially declared on. *Haynes v. Woods*, 1 Stew. (Ala.) 12. So, it is held, that where there is an express agreement for particular services for a certain time, and the plaintiff is discharged by the defendant before the time has elapsed, and is prevented from performing the services, he must declare on the special agreement. *Algeo v. Algeo*, 10 Serg. & R. 235; *Donaldson v. Fuller*, 3 id. 505; but see *Perkins v. Hart*, 11 Wheat. 237; *Cutler v. Powell*, 2 Smith's Lead. Cas. 51, 52; *ante*, § 2. If there has been an entire executory contract, and the plaintiff has performed a part of it, and then willfully refuses, without legal excuse and against the defendant's consent, to perform the rest, he can recover nothing either in *general* or *special* assumpsit. *Dermott v. Jones*, 2 Wall. 1, 9; *Stark v. Parker*, 2 Pick. 267; *Angle v. Hanna*, 22 Ill. 431; *Malbon v. Birney*, 11 Wis. 111; *Cutter v. Powell*, 2 Smith's Lead. Cas. (7th Am. Ed.) 53, 54; and see *Neville v. Frost*, 2 E. D. Smith (N. Y.), 63; *Jones v. Jones*, 4 Md. 607; *Pullman v. Corning*, 14 Barb. 174; S. C. affirmed, 9 N. Y. (5 Seld.) 174.

ARTICLE IV.

WHEN THE ACTION DOES NOT LIE.

Section 1. In general. An *assumpsit* will not generally be implied where there is an express promise (*Worthen v. Stevens*, 4 Mass. 449; *Whiting v. Sullivan*, 7 id. 107. See *ante*, 74); nor will *assumpsit* on an implied promise lie, as a general rule, against the express declaration of the defendant (*Id.*; *Jewett v. Somerset*, 1 Me. 125); unless there is a legal obligation paramount to the will of the party. See *United States v. Wolf*, Add. (Penn.) 312; *Proprietors v. Taylor*, 6 N. H. 499; *ante*, art. III, § 2. It will not lie upon a contract under seal (*North v. Nichols*, 37 Conn. 375; *Norris v. Maitland*, 9 Phil. [Penn.] 7); unless the contract has been subsequently varied by the parties (*Aikin v. Bloodgood*, 12 Ala. 231; *Smith v. Smith*, 45 Vt. 433; *Pierce v. Lacy*, 23 Miss. 193; *Brown v. Gauss*, 10 Mo. 265; *Little v. Morgan*, 31 N. H. 499); and a contract for a fixed salary and an implied *assumpsit* cannot stand together. *Chandler v. State*, 5 Harr. & J. (Md.) 284. Thus, the judicial services of a judge, who has a fixed salary, is not a foundation from which an *assumpsit* on the part of the State can be implied. *State v. Chase*, 5 id. 287; *ante*, 74. *Assumpsit* for money paid to the use of another will not lie where there was no express or implied promise on

his part to repay it. *Briscoe v. Power*, 64 Ill. 72; *Ingraham v. Gilbert*, 20 Barb. 151; *Homestead Company v. Valley Railroad*, 17 Wall. 153. And the law will not imply a promise when the circumstances repel all implication of a promise, in fact. Thus, it is held that *assumpsit* will not lie for the value of personal property, against a trespasser who still retains the property in his possession. *Kelty v. Owens*, 4 Chand. (Wis.) 166; *Watson v. Stever*, 25 Mich. 386.

In further illustration of this subject it has been held that *assumpsit* cannot be maintained on a specialty (*Dubois v. Doubleday*, 9 Wend. 317; *Hinkley v. Fowler*, 15 Me. 285; *Gazum v. Ohio Ins. Co.*, Wright [Ohio], 214); on an award, when the submission to arbitration is under seal (*McCargo v. Crutcher*, 23 Ala. 575; *Tullis v. Sewell*, 3 Ohio, 510; *Holmes v. Smith*, 49 Me. 242); for labor and materials furnished under a sealed contract with a corporation (*Porter v. Androscoggin, etc., R. R. Co.*, 37 Me. 349); on a policy of insurance under seal (*Marine Ins. Co. v. Young*, 1 Cranch, 332; *Strobel v. Large*, 4 McCord [S. C.], 114); to enforce the liability of one who has assigned a specialty by indorsement under seal (*Sommerville v. Stephenson*, 3 Stew. [Ala.] 271); nor to recover back the price of property under a warranty contained in a sealed instrument. *Anderson v. Solomon*, 2 Treadw. Const. (S. C.) 329. So it has been held not to lie upon a judgment rendered in a sister State (*India Rubber Co. v. Hoit*, 14 Vt. 92; *Andrews v. Montgomery*, 19 Johns. 162; *Garland v. Tucker*, 1 Bibb [Ky.], 361; *McKim v. Odom*, 12 Me. 94; but see *Hubbell v. Coudrey*, 5 Johns. 132; *Lambkin v. Nance*, 2 Brev. [S. C.] 99); nor on a judgment of a court in the same State (*Vail v. Mumford*, 1 Root [Conn.] 142); nor to try the title to land (*Baker v. Howell*, 6 Serg. & R. [Penn.] 481; *Binney v. Chapman*, 5 Pick. 140; *Miller v. Miller*, 7 id. 133); nor to recover for the loan of scrip (*Farrar v. Baber*, Ga. Dec. Part 11, 125); nor to recover dues payable out of a particular fund (*Insane Hospital v. Higgins*, 15 Ill. 185); nor on a parol demise (*Wise v. Decker*, 1 Cranch [C. C.], 171); nor for breach of promise of marriage, if the defendant was under age at the time of the promise. *Evans v. Terry*, 1 Brev. (S. C.) 80. It cannot be maintained against an executor, for a distributive share of an estate, without an express promise to pay (*Van Car v. Haslett*, Wright [Ohio], 457); nor against executors on a promise by them to perform a covenant made by their testator (*Landis v. Urie*, 10 Serg. & R. 316); nor against a public officer for neglect

or misbehavior in office (*Bailey v. Butterfield*, 14 Me. 112; *McMillan v. Eastman*, 4 Mass. 378); nor against a collector of taxes for a neglect to levy, collect and pay over the taxes. *Charleston v. Stacy*, 10 Vt. 562; and see *Osborn v. Bell*, 5 Denio, 370. *Assumpsit* will not lie for use and occupation where rent is reserved by deed, although there be an express parol promise by the lessee (*Hawkes v. Young*, 6 N. H. 300; *Codman v. Jenkins*, 14 Mass. 95); unless such promise is made on a new consideration. *Ib.* See *Bell v. Ellis*, 1 Stew. & P. (Ala.) 294. And the same is true in regard to a promise by an obligor to pay his bond to the obligee at a future day. *Andrews v. Montgomery*, 19 Johns. 162. A grantor verbally bargained certain land for a specified consideration, and, either by mistake or fraud, the premises conveyed did not include a parcel of ten acres embraced in the bargain. Without rescinding the contract, the plaintiff brought *assumpsit* to recover the value of the lot thus omitted, or a proportional part of the consideration paid; and it was held, that the action would not lie. *Rand v. Webber*, 64 Me. 191.

When a statute confers a new power, and provides the means of executing it, those who claim the power can execute it in no other way. *Assumpsit* will not, therefore, lie for assessments on shares in the stock of a corporation (*Franklin Glass Co. v. White*, 14 Mass. 286; *ante*, 42, 43), unless there be an express promise to pay them. *Worcester Turnp. v. Willard*, 5 Mass. 80; *Dutchess Cotton Manuf. Co. v. Davis*, 14 Johns. 238.

In *assumpsit* by a building committee against one of the signers of a subscription paper, whereby he agreed to pay a certain sum toward the building, it appeared that after the subscription the building committee had been chosen at a meeting of some of the subscribers, but it did not appear that the defendant was present or was notified of the meeting, and none of the committee were among the subscribers; and it was held, that there was no privity between the plaintiffs and the defendant, and that the action could not be maintained. *Curry v. Rogers*, 21 N. H. 247; and see *Troy Academy v. Nelson*, 24 Vt. 189. See *ante*, 104, 105.

§ 2. When *indebitatus assumpsit* does not lie. *Indebitatus assumpsit* will not lie for services voluntarily rendered. There must be a contract, express or implied, between the parties, or it cannot be maintained. *Force v. Haines*, 17 N. J. (Law), 385; *Watkins v. Trustees of Richmond College*, 41 Mo. 302. Notwithstanding a verbal promise to pay for the services, made after

their rendition. *Sanderson v. Brown*, 57 Me. 308. Nor will it lie where an express contract, although not under seal, is still open, or is to be performed in future. *Christy v. Price*, 7 Mo. 430; *Dermott v. Jones*, 23 How. 233; *Speake v. Sheppard*, 6 Harr. & J. (Md.) 81; *Charles v. Dana*, 14 Me. 383; *Felton v. Dickinson*, 10 Mass. 287; *Kelly v. Foster*, 2 Binn. (Penn.) 4; *ante*, 74. The action in such case must be on the contract. *Id.* And see *Harris v. Ligget*, 1 Watts & S. (Penn.) 301; *Camp v. Barker*, 21 Vt. 469; *Wooten v. Reed*, 10 Miss. 585. So, the action must be special upon a collateral undertaking to pay the debt of another. *Johnson v. Clark*, 5 Blackf. (Ind.) 564; *Elder v. Warfield*, 7 Harr. & J. (Md.) 391. And if A employs B to make a particular article for A, out of materials furnished by B, and during the progress of the work, and before it has assumed the character contracted for, or has been accepted by A, or appropriated to his use, the work is stopped by him, the proper remedy for B is a special action for refusing to accept the article, or for preventing its completion. *Allen v. Jarvis*, 20 Conn. 38.

Indebitatus assumpsit will not lie to recover the price of grain growing in the ground (*Lewis v. Culbertson*, 11 Serg. & R. 48); nor for the price of a tract of land (*Haskins v. Wright*, 1 H. & M. [Va.] 378); nor to recover the value of produce, or damages for not delivering it, where the entire contract is to deliver certain quantities of produce (*Coursey v. Covington*, 5 Harr. & J. [Md.] 45); nor upon a promise to pay damage caused by the defendant, where the amount of the damage is not ascertained at the time of the promise (*Page v. Babbitt*, 21 N. H. 389); nor for goods sold and delivered, where there has not been either an actual delivery, or what in point of law amounts to a delivery of the goods. *Messer v. Woodman*, 22 id. 172. So, it will not lie on an undertaking to get land surveyed for the plaintiff (*Young v. Hays*, 2 Yeates [Penn.], 216); nor for interest on a judgment debt during the suspension of the execution by the creditor (*Beedle v. Grant*, 1 Tyler [Vt.], 433); nor upon an express contract, although it is not under seal and has been performed, if the consideration is payable, by the terms of the contract, not in money but in specific property (*Cochran v. Tatum*, 3 T. B. Monr. [Ky.] 405; see *ante*, 374, art. 3, § 3); nor where the agreement is not for the payment of money, but for the doing of some other thing (*Spratt v. M'Kinneys*, 1 Bibb [Ky.], 595); as where the defendant agreed to pay the plaintiff in tobacco for his ser-

vices as overseer. *Brookes v. Scott*, 2 Munf. (Va.) 344; see *Marshall v. McPherson*, 8 Gill & J. (Md.) 333.

But a contract will be implied to pay what a service is reasonably worth, where such service is rendered even without a party's knowledge; if it was an act of necessity, for which he was bound to provide, or where it can be assumed that he necessarily would, had he known of the exigency, required it to have been done, understanding that he was to pay for it. *Hewett v. Bronson*, 5 Daly (N. Y.), 1.

ARTICLE V.

WHO MAY BRING THE ACTION.

Section 1. In general. The action of *assumpsit* may be brought by the party from whom the consideration of the promise moved, or by the person for whose benefit it was paid. See *ante*, art. 1, § 3; *Strohecker v. Grant*, 16 Serg. & R. 241; *Todd v. Tobey*, 29 Me. 219; *Felton v. Dickinson*, 10 Mass. 287; *Rogers v. Gosnell*, 58 Mo. 589; *Same v. Same*, 51 id. 466; *Steene v. Aylesworth*, 18 Conn. 244; *Hitchcock v. Lukens*, 8 Port. (Ala.) 333. But when neither the consideration moves from the plaintiff, nor the promise is made to him, nor for his benefit, an action cannot be maintained. *Shear v. Overseers of Hillsdale*, 13 Johns. 495; and see *Warden v. Burnham*, 8 Vt. 390. See *ante*, 103, 104.

The following instances may serve to illustrate the application of the rule above stated: If A promises B, in writing, to pay certain debts of B, the creditors to whom those debts are due may maintain an action on the promise, as if made to themselves. *Arnold v. Lyman*, 17 Mass. 400. So, A being indebted to B, and B to C, it was agreed between them that A should pay C the amount of the debt due B, and C agreed, with the consent of A and B, to take A as his debtor; and it was held that C might sue A for the amount, and that B's debt to C was extinguished. *Grover v. Sims*, 5 Blackf. (Ind.) 498; *ante*, 81. A, owing B, remitted money to C, to be paid to B. C afterward promised B to pay the money to him. B may maintain an action against C to recover the money. *Wyman v. Smith*, 2 Sandf. (N. Y.) 331. But where A, being indebted to B, promises B to pay the amount to C, the promise not being in writing, C cannot maintain an action against A to

recover the amount, unless there is a new and distinct consideration for the promise, moving to A, either from B or C. *Blunt v. Boyd*, 3 Barb. 209; S. C., 6 N. Y. Leg. Obs. 361; 1 Code R. 7. And where A paid money to B for the use of C, to whom he was not indebted, by mistake, intending to have paid it for the use of D, to whom he owed it; this was held not to give D a right of action for the money, but that A must recover it back as having been paid by mistake. *Wilson v. Greer*, 7 Humph. (Tenn.) 513. See *ante*, 103, 104.

A bought out the business and store of B, and agreed to pay certain debts, indorsed on the bill of sale, among which was a debt due to C; and it was held, that C could maintain *assumpsit* against A on his promise. *Beet v. McLaughlin*, 12 Mo. 493; *Corl v. Riggs*, 12 id. 430. And where B obtained goods on the letter of credit of A, who paid for them, it was held, that A might recover the amount so paid of B, although the goods were charged to B and C, and although A paid without suit. *Lindsay v. Moore*, 9 id. 176. A parol promise "to bestow to A, for B's services as preacher, \$25, and to cease at this date," will support an action only in the name of B. *Edmundson v. Penny*, 1 Penn. St. 334.

A made a single bond for \$400 payable to B, and by him passed to C without indorsement. On the representation of A that he was entitled to a credit thereon, C admitted it, took a new bond to himself for the balance, and gave up the old bond. Afterward, C brought suit against A to recover the sum allowed as a credit, on the ground that it was not due, and had been allowed by mistake. It was held, that he could not recover, because, if any promise of C was to be implied for its repayment, it must be a promise to the legal owner of the first bond. *Dickey v. Johnson*, Busbee's Law (N. C.), 405.

If a bank takes a draft as so much money, and agrees to pay the note of the person who delivers the draft, the holder of the note thereafter assenting to such arrangement may recover the amount of the note from the bank; the indebtedness of the maker of the note being a sufficient consideration, and the holder becoming thereby the party beneficially interested and entitled to sue. *Commercial Bank v. Wood*, 7 Watts & Serg. 89.

And where land is conveyed, subject to a mortgage for which the grantor is personally liable, and the deed declares that the grantee is to pay the mortgage as a part of the purchase-money, he is liable to the grantor for the amount of the mortgage, as it

becomes due, in an action of *assumpsit*. *Rawson v. Copeland*, 2 Sandf. Ch. 251. *Burr v. Beers*, 24 N. Y. (10 Smith) 178.

The action lies for a corporation. *Dean and Chapter of Rochester v. Pierce*, 1 Camp. 466; and against it, in the United States, *Chesapeake and Ohio Canal Company v. Knapp*, 9 Pet. 541; *Hayden v. Middlesex Turnp. Corp.*, 10 Mass. 397; *Dunn v. Rector, etc., of St. Andrews*, 14 Johns. 118; *Waring v. Catawba Company*, 2 Bay (S. C.), 109. But it does not lie against a corporation in England, unless by express authority of statute. 1 Chitt. Pl. 98.

Assumpsit on a *quantum meruit*, for work done by two partners, must be brought in the name of both, though the contract was made by one before the partnership. *Schnader v. Schnader*, 26 Penn. St. 384.

No action can be maintained by the treasurer of an association not incorporated, upon a written promise to pay money as a subscription, the same being payable to the "treasurer" of such association alone. *Ewing v. Medlock*, 5 Port. (Ala.) 82; *Nash v. Russell*, 5 Barb. 556. So, the plaintiff in an execution cannot maintain an action upon the promise of the defendant made to the constable having the execution, to pay him the amount. *Cummings v. Klapp*, 5 Watts & Serg. 511. And a bailee of property cannot be charged, in an action of *assumpsit* brought in the name of a purchaser, upon a contract of bailment made with the former owner. *Willard v. Bridge*, 4 Barb. 361. So, where money has been placed in the hands of a party, as agent or bailee, with instructions for a particular purpose, and the bailee has acted in pursuance of these instructions, the administrator of the person placing the funds cannot maintain *assumpsit* against the bailee for the particular fund. *Simpson v. Barry*, 2 M'Mull. (S. C.) 369.

ARTICLE VI.

OF THE PLEADINGS IN THE ACTION.

Section 1. The declaration, in general. The declaration in assumpsit is either *special* or *general*, the latter being called the *indebitatus* count. In case of a special assumpsit, the contract should be stated in terms. See *Woody v. Flournoy*, 6 Munf. (Va.) 506; *Royalton v. R. & W. Turnp. Co.*, 14 Vt. 311; *Northup v. Jackson*, 13 Wend. 85. But, in general, *assumpsit* contains only a general recital of a consideration, promise, and

breach ; and several of the common counts are frequently used to describe the same cause of action. See 1 Archb. N. P. 124 ; *Wheelwright v. Moore*, 1 Hall (N. Y.), 201 ; *Copes v. Matthews*, 18 Miss. 398 ; *Bayer v. Reeside*, 14 Penn. St. 167 ; *Nave v. Berry*, 22 Ala. 382 ; *Bailey v. Freeman*, 4 Johns. 280 ; *Norris v. Durham*, 9 Cow. 151.

The distinguishing feature between the common counts in *assumpsit* and in *debt* is, that in the former action the word "promised" is used, and in the latter the word "agreed." *Cruikshank v. Brown*, 10 Ill. 75 ; *McGinnity v. Languerrenne*, id. 101.

§ 2. *Averments.* A declaration in *assumpsit* should contain a statement of facts showing a sufficient consideration to support the alleged promise. *People's Bank v. Adams*, 43 Vt. 195. If no consideration is alleged, no cause of action is shown, and the declaration will be bad after verdict, and on error. *Benden v. Manning*, 2 N. H. 289 ; *Mosely v. Jones*, 5 Munf. (Va.) 23 ; *Hemmenway v. Hickes*, 4 Pick. 497 ; *Colborn v. Pomeroy*, 44 N. H. 19. And the whole of the consideration, if it be an entire one, must be stated ; no part of it can be omitted. *Clark v. Gray*, 6 East, 568 ; *Neal v. Viney*, 1 Camp. 471 ; *Symonds v. Carr*, id. 361.

In *assumpsit* upon an executory agreement, where the plaintiff's promise is the consideration for the defendant's undertaking, the declaration must allege the plaintiff's promise explicitly and expressly. Therefore, where the declaration stated, that in consideration that the plaintiff, at the special instance and request of the defendant, would labor for the defendant for one year, the defendant promised, etc., and there was no averment that the plaintiff had performed such labor, either wholly or partially, it was held that the words "would labor" did not import a promise to labor ; and that the declaration was insufficient, even after verdict. *Russell v. Slade*, 12 Conn. 455.

In an *assumpsit* on a collateral undertaking, the declaration should show as well the consideration of the promise as the special circumstances under which it was made. *Johnson v. Clark*, 5 Blackf. (Ind.) 564.

But a declaration relying on the common counts in *assumpsit* need not set forth what was the consideration for an alleged promise. That is held matter of evidence. Thus, a landlord who has made repairs on his own store under an arrangement with the tenant that the landlord should make such repairs, and

that the tenant might surrender his lease, and, in consideration of his being allowed to do so, should pay the landlord for the repairs, may recover of the tenant the cost of the repairs, under the common counts in assumpsit, without setting up the special circumstance of the agreement. *Crane v. Grassman*, 27 Mich. 443. See, generally, *M'Kee v. Bartley*, 9 Penn. St. 189; *Carter v. Graves*, 9 Yerg. (Tenn.) 446; *Lyon v. Alcord*, 18 Conn. 66; *Hall v. Smith*, 3 Munf. (Va.) 550.

The declaration must also aver the promise of the defendant; otherwise it is insufficient, even after verdict. *McNulty v. Collins*, 7 Mo. 69; *Benden v. Manning*, 2 N. H. 289; *Hayter v. Moat*, 2 Mees. & W. 56; *Candler v. Rossiter*, 10 Wend. 487. Nor is it enough to allege the facts upon which the law raises an implied promise; the promise itself must be alleged, or the declaration will be fatally defective. *Ib.*; *Wings v. Brown*, 12 Rich. (S. C.) 270. But see *Bell v. Hobbs*, Ga. Dec., Part 11, 144; *Avery v. Tyringham*, 3 Mass. 160; *Clark v. Reed*, 20 Miss. 554. Where an express promise is the same as the law implies, either may be declared on; but, if the express promise differs from what the law implies, it must be set out in the pleading. *Princeton, etc., Turnp. v. Gulick*, 16 N. J. (Law) 161. Mutual promises must be alleged to have been made at the same time. *Livingston v. Rogers*, 1 Caines, 583; *Whitehall v. Morse*, 5 Serg. & R. 358. And the promise and the breach thereof must be alleged to have been made before the commencement of the action. If alleged to have been made after, the declaration is bad in any stage of the cause. *Warring v. Yates*, 10 Johns. 119; *Gordon v. Kennedy*, 2 Binn. (Penn.) 287; *Rand v. Griffith*, 11 Serg. & R. 130; *Harper v. Montgomery*, 5 Litt. (Ky.) 347.

In assumpsit upon an instrument, itself containing a promise or undertaking to pay, it is held unnecessary to formally set forth another promise, resulting from legal liability. *Woodson v. Moody*, 4 Humph. (Tenn.) 303.

In all cases where, by the terms of the contract, the defendant is not bound to perform his promise, until after the plaintiff or some other person shall have done some other act, the declaration must state the contract accordingly, and must aver that such other act has been done. An averment of readiness is not sufficient. 1 Archb. N. P. 132; *McIntire v. Clark*, 7 Wend. 330; *Zerger v. Sailor*, 6 Binn. (Penn.) 24. But this rule does not hold where the defendant has disabled himself from performing his part of the contract. *Newcomb v. Brackett*, 16 Mass. 161; and

see *Frost v. Clarkson*, 7 Cow. 24; *Hill v. Campbell*, 6 Me. 111. And where one promise is the consideration of another, it is not necessary, in declaring for a breach of the one, to allege a performance of the other. *Whitehall v. Morse*, 5 Serg. & R. 358; and see *Close v. Miller*, 10 Johns. 90; *Dey v. Dox*, 8 Wend. 129. So, if the act to be done by the plaintiff be the payment of money, and the act of the defendant be the delivery of goods, etc., the plaintiff need not aver the payment, or even a tender of the money to the defendant; it will be sufficient to aver that he was ready and willing to pay for the goods on delivery. *Bristow v. Waddington*, 2 New Rep. 355; *Rawson v. Johnson*, 1 East, 203; *Waterhouse v. Skinner*, 2 Bos. & P. 447; *Robinson v. Tyson*, 46 Penn. St. 286.

The omission by the plaintiff to allege an excuse for the non-performance of his part of the contract is cured by verdict. *Helm v. Wilson*, 4 Mo. 481.

As it regards averment of a demand or notice it is held, that if a declaration sets out a legal liability and alleges a subsequent promise to pay on request, it is good, although there is no allegation of request made. *Henderson v. Howard*, 2 Ala. 342. But see *McEwan v. Morey*, 60 Ill. 32. In actions on an *insimul computassent*, the bringing of the action is a sufficient demand (*Greenwood v. Curtis*, 6 Mass. 366), and this rule applies in all other cases where there is a precedent debt or duty. *Thomas v. Roosa*, 7 Johns. 462; *Ernst v. Bartle*, 1 Johns. Cas. 319; *Leffingwell v. White*, id. 99. Where, from the nature of the agreement, a special demand is necessary, but not averred in the declaration, such omission will be aided by verdict. *Rodgers v. Love*, 2 Humph. (Tenn.) 417. And where a previous demand is necessary to maintain a suit against two joint promisors, to aver a demand on one is sufficient. *McFarland v. Crary*, 8 Cow. 253; *Griswold v. Plumb*, 13 Mass. 298.

A breach of the defendant's promise must also be alleged, or the declaration is bad. *Bender v. Manning*, 2 N. H. 289. But in *assumpsit*, several breaches of the same contract may be assigned in one count. *Smith v. Boston, etc.*, R. R., 36 id. 458. The breach may be assigned in the words of the promise, if those words show, with sufficient certainty, a breach within the intent and meaning of the promise, but not otherwise. If the promise be in the alternative, that the defendant would do one thing or another, the breach must negative both, in the disjunctive, that the defendant did neither the one thing nor the other. 1 Archb.

N. P. 134. A breach badly assigned is bad on general demurrer; but is aided by verdict for the plaintiff. *Id.* And see *Pasteur v. Parker*, 3 Rand. (Va.) 458; *Bank v. Beebe*, 6 Ohio, 498.

A plaintiff in *indebitatus assumpsit*, claiming under a verbal statement of accounts, must make a full exhibit of the accounts which he claims to have been adjusted, that the defendant may object to them in whole or in part, and dispute any item separately. A mere allegation that the accounts were stated and adjusted, leaving the defendant in arrear to the amount claimed, is held insufficient. *Neyland v. Neyland*, 19 Tex. 423.

Where the gist of the action is a recovery by a third person against the plaintiff, it is not necessary for him to set forth in what manner that third person commenced his suit. *Allaire v. Ouland*, 2 Johns. Cas. 52.

Under the practice in Maryland, the omission to prefix the averment, "for money payable by the defendant to the plaintiff," to the common counts in a declaration in *indebitatus assumpsit*, is fatal on demurrer. *Merryman v. Ryder*, 34 Md. 98.

§ 3. What may be pleaded in defense. An *assumpsit* is an action founded on a contract, the non-performance of which is a fraud and injury to the plaintiff; and, therefore, the defendant must show that there was no contract, or that the contract was void and without consideration, or that he has performed it, and is, therefore, discharged. *Bac. Abr.*, Assump. H. The defenses of infancy, coverture, a release, the statute of limitations, etc., will be fully discussed under those respective heads, in that portion of this work specially treating of defenses, and a reference to them generally is here made.

If two modes of relief are open to a plaintiff, and he elects to bring *assumpsit*, the defendant may urge any defense peculiar to that action, although the same defense could not have been insisted on if the other action had been pursued. *Meredith v. Richardson*, 10 Ala. 828.

§ 4. The general issue. In an action of *assumpsit*, the plea of the general issue, or *non-assumpsit*, puts the plaintiff upon proving his whole case, and entitles the defendant, without prior special notice, to give evidence of any thing which shows that the plaintiff, *ex aquo et bono*, ought not to recover. *Falconer v. Smith*, 18 Penn. St. 130; *Heck v. Shener*, 4 Serg. & R. 249. Thus, the defendant, under the general issue, may in all cases dispute and disprove the consideration stated on the face of the declaration (*Beech v. White*, 12 Ad. & El. 668; S. C., 4 P. & D. 399;

Brydges v. Lewis, 3 Q. B. 603; *Sutherland v. Pratt*, 11 M. & W. 296), except in the case of mutual promises. He may also dispute and disprove the promise. *Id.* In cases within the statute of frauds, he may prove that the contract was not in writing, and that the statute in other respects was not complied with. See *Eastwood v. Kenyon*, 11 Ad. & El. 438; *Buttermere v. Hayes*, 5 Mees. & W. 456; *Leaf v. Turton*, 10 id. 393. In an action for work and labor, he may prove that the plaintiff agreed to do the work without reward (*Jones v. Nanney*, 1 id. 383); or without reward, unless it answered a particular purpose, and that it did not answer that purpose. *Hayselden v. Staff*, 5 Ad. & El. 153; *Grounsell v. Lamb*, 1 Mees. & W. 352. So, in *indebitatus assumpsit*, for work done or goods sold, the defendant may prove that the work was improperly done, or the goods not such as were contracted for. *Cousins v. Paddon*, 2 Cr. M. & R. 556; *Sisson v. Willard*, 25 Wend. 373; *Gaw v. Wolcott*, 10 Penn. St. 43. And in general, every thing which is incumbent on the plaintiff to prove, the defendant may disprove under general issue. 1 Archb. N. P. 145.

Several defendants, sued upon a joint *assumpsit*, cannot severally plead the general issue (*Meagher v. Bachelder*, 6 Mass. 444); nor can they severally plead the same plea in bar. *Ward v. Johnson*, 13 id. 152.

Where a party is sued in *assumpsit* as the indorser of a note, and he pleads the general issue, he thereby admits the character of indorser, in which he is sued. *Tilman v. Ailles*, 13 Miss. (5 Smed. & M.) 373.

§ 5. *Special pleas.* In *assumpsit*, certain matters of defense may be pleaded specially or given under the general issue; but a special plea in bar must always give color to the plaintiff's right. *Dibble v. Duncan*, 2 McLean, 553. Special pleas admit the contract as stated in the declaration, and show, either a performance by the defendant, or facts which in law excuse or justify the non-performance of it. Archb. Pl. & Ev. 202. It follows, that a special plea which amounts to the general issue, must be bad on special demurrer (id. 177, 180); for, so far from confessing the contract, it denies it. Arch. N. P. 147. See *Armstrong v. Webster*, 30 Ill. 383; *Goodrich v. Reynolds*, 31 id. 490. Therefore, where to an action for work, labor and materials, the defendant pleaded that by agreement the amount was to be taken in malt and beer, and that he was always ready and willing to deliver such malt and beer to the plaintiff; this was

held bad, as amounting to the general issue, for it denied the contract stated in the declaration. *Collingbourne v. Mantell*, 5 Mees. & W. 289; and see *Dicken v. Neale*, 1 id. 556; *Cleworth v. Pickford*, 7 id. 314; *Morgan v. Pebrer*, 3 Bing. (N. C.) 457; *Lyall v. Higgins*, 4 Q. B. 528. So, where the plea qualifies the contract stated in the declaration, and introduces a new stipulation into it, it is bad as amounting to the general issue, although in truth it only set out what was the actual agreement between the parties. *Nash v. Breeze*, 11 Mees. & W. 352; and see *Williams v. Vines*, 1 Dowl. & L. 710; S. C., 13 Law J., N. S. (Q. B.), 326.

ARTICLE VII.

OF THE EVIDENCE IN THE ACTION.

Section 1. Under the common counts. In *assumpsit*, the consideration of the promise must not only be proved, but it must be proved as laid in the declaration. *Knox v. Martin*, 8 N. H. 154; *Swallow v. Beaumont*, 2 B. & A. 765; *Clarke v. Gray*, 6 East, 564. Where the plaintiff counts generally, and also specially, and fails to prove the special contract, he may recover on the common counts; but if he prove a different special contract, he can recover neither on the special nor the general counts. *Draper v. Randolph*, 4 Harr. (Del.) 454; *Morris v. Burton*, id. 53.

In *assumpsit* to recover the debt of a third person, the proof of the defendant's promise to pay the same must be clear, explicit and certain. *Petriken v. Baldy*, 7 Watts & Serg. 429.

Where a writing is offered in evidence, under the common counts, its execution must be proved. *Hunley v. Lang*, 5 Port. (Ala.) 154. Among the writings held admissible under the common counts are the following: A sealed contract (*Carter v. Collar*, 1 Phil. [Penn.] 339; *Gouverneur v. Elliot*, 2 Hall [N. Y.] 211); a promissory note (*Cushing v. Gore*, 15 Mass. 74; *Hinsdale v. Bank of Orange*, 6 Wend. 378; *Woods v. Schroeder*, 4 Harr. & J. [Md.] 276; *Boyle v. Carter*, 24 Ill. 49; *McFerran v. Chambers*, 64 id. 118); a note payable in specific property (*Taplin v. Packard*, 8 Barb. 220; *St. Louis, etc., Ins. Co. v. Soulard*, 8 Mo. 665); a bank check (*Carter v. Hope*, 10 Barb. 180; *Howes v. Austin*, 35 Ill. 396); a coupon (*Johnson v. Stark*, 24 id. 75); an award (*Brady v. Mayor*, 1 Barb. 584); a bill of exchange (*Wells v. Brigham*, 6 Cush. 6; *Farmers', etc., Bank v. Payne*, 25 Conn. 444; *Purdy v. Vermilya*, 8 N. Y. [4 Seld.] 346); the

acknowledgment of a debt (*Carver v. Hayes*, 47 Me. 257; *Morse v. Allen*, 44 N. H. 33; *Rutledge v. Moore*, 9 Mo. 537); certificates of deposit (*Swift v. Marsh*, 20 Ill. 144; *State Bank v. Corwith*, 6 Wis. 551); and an account stated (*Stowe v. Sewall*, 3 Stew. & P. [Ala.] 67; see, also, *Gregory v. Bailey*, 4 Harr. [Del.] 256. So, a writing as follows: "For value received of Cummings & Manning, or order, thirty dollars and eighty-three cents on demand, and interest annually," and signed by the defendant, was held competent and sufficient evidence under a count for money had and received. *Cummings v. Gassett*, 19 Vt. 308. But it was held that a memorandum, made by a payee of a note for \$2,500, on the back thereof in these words, "Mr. O., pay on within \$750," did not support a recovery on the money counts, by the holder against the payee. *Douglass v. Wilkeson*, 6 Wend. 637. See *Shoop v. Clark*, 1 Keyes (N. Y.), 181; S. C., 4 Abb. Ct. App. 235.

A count for money paid to B by A, at the request of and for the use of C, is supported by proof of the sale of a bond by A to B, and that B credited C with the amount. *Jones v. Cooke*, 3 Dev. L. (N. C.) 112.

§ 2. Under special counts. Where the declaration is upon a special contract, the contract must be proved as set forth, or the plaintiff cannot recover. And, if the evidence in relation to the contract and the supposed breach thereof is altogether variant from that which is set out in the declaration, a verdict for the plaintiff must be set aside and a new trial granted. *Kidder v. Flagg*, 28 Me. 477. On a special count upon an executory contract, the plaintiff is not entitled to recover by proof of an executed contract. *Simpson v. Warren*, 5 Harr. (Del.) 371. But, in a special count, it is no objection to the admission of evidence, that it does not prove a cause of action, if it prove the promise declared on. *Wheelock v. Wheelock*, 5 Vt. 433.

Where the action was for the breach of a contract to devise land to the plaintiff, in compensation for services, it was held, that the want of evidence of the value of the services did not preclude a recovery on a *quantum meruit*, the plaintiff being entitled to at least nominal damages. *Bash v. Bash*, 9 Penn. St. 260. See, generally, *Clark v. Gilbert*, 26 N. Y. (12 Smith) 279; *Holley v. Borland*, 16 La. Ann. 186; *Gammaye v. Alexander*, 14 Tex. 414; *Cutter v. Powell*, 2 Smith's Lead. Cas. (7th Am. ed.) 262.

§ 3. Under the general issue. Evidence under the general issue has been noticed briefly in a preceding article. See *ante*, 396, art. 5, § 4. In further illustration of the doctrine there stated, it may be added that the defendant in *assumpsit* may, under the general issue or *non-assumpsit*, give in evidence any matter which shows that the plaintiff never had a cause of action. *Craig v. Missouri*, 4 Pet. 426; *Wilt v. Ogden*, 13 Johns. 56; or, most matters of discharge, which show that, at the commencement of the suit, there was no subsisting cause of action. *Cook v. Vimont*, 6 T. B. Monr. (Ky.) 284; *Edson v. Weston*, 7 Cow. 278; *Smart v. Baugh*, 3 J. J. Marsh. (Ky.) 163. Thus, infancy (*Wailing v. Toll*, 9 Johns. 141; *Stansbury v. Marks*, 4 Dall. 130); usury (*Cotton v. Lake*, 2 Mass. 540); want of consideration or illegal consideration (*Hilton v. Burley*, 2 N. H. 193; *Craig v. Missouri*, 4 Pet. 436); deceit in a sale (*Sill v. Rood*, 15 Johns. 230); the mental incapacity of the defendant, when the promise was made (*Mitchell v. Kingman*, 5 Pick. 431); that the promise declared on was for money won at gaming, contrary to statute (*Jones v. Pryor*, 1 Bibb [Ky.], 614); payment (*Drake v. Drake*, 11 Johns. 531; *McDonald v. Faulkner*, 2 Ark. 472); a release (*Dawson v. Tibbs*, 4 Yeates [Penn.], 439); an offer to perform the promise, and prevention by the plaintiff (*Wilt v. Ogden*, 13 Johns. 56); a former judgment, etc., between the same parties, on the same cause of action (*Kilheffer v. Herr*, 17 Serg. & R. 325; *Young v. Black*, 7 Cranch, 565; *Arnold v. Paxton*, 6 J. J. Marsh. [Ky.] 503); or whatever shows the contract void, or defeats the promise (*Talbert v. Cason*, 1 Brev. [S. C.] 298); are all matters that may be given in evidence under the general issue. So, a former recovery (*Carroll v. Garrigues*, 5 Penn. St. 152; *Young v. Rummell*, 2 Hill [N. Y.], 478); an accord and satisfaction (*Stewart v. Saybrook*, Wright [Ohio], 374; *Chappell v. Phillips*, id. 372); or a partial as well as an entire payment, may be so given in evidence. *Dingee v. Letson*, 15 N. J. (Law) 259; *Britton v. Bishop*, 11 Vt. 70. And payment after action brought may be shown under the general issue, in reduction of damages. *Hendrickson v. Hutchinson*, 29 N. J. (Law) 180; *Pemigewasset Bank v. Brackett*, 4 N. H. 557; *McMillan v. Wallace*, 3 Stew. (Ala.) 185; see *Boyd v. Weeks*, 2 Denio, 321. But an award made *pendente lite* cannot be shown unless it is pleaded. *Harrison v. Brock*, 1 Munf. (Va.) 22.

In *assumpsit* upon a note given for the price of goods, a breach of warranty may be given in defense, under the general issue.

Robinson v. Windham, 9 Port. (Ala.) 397. And the defendant may prove under the general issue, that the action was commenced before the debt was due. *Rainey v. Long*, 9 Ala. 754.

In an action of *assumpsit* for work done and materials furnished in the erection of a house, upon a contract in which the prices are only stipulated in part, and in which the plaintiff bound himself expressly to complete the building faithfully, and deliver it at an appointed time; or, on failure so to do, to deduct from the contract price of the house the rent that would have been received for it during the period of delay, the defendant is entitled to prove that the work was defective, and that it was not completed within the time limited, and to claim an offset for damage arising from such defective work and lost rent. *Davis v. Baxter*, 2 Patt. & H. (Va.) 133.

§ 4. **Under plea of payment.** Under this plea, it is held, that the defendant cannot give evidence tending to disprove the cause of action set forth in the plaintiff's statement. *Hamilton v. Moore*, 4 Watts & S. 570. But evidence of payment in other things than money may be given. *Id.* And after a plea of payment, the defendant cannot object that the instrument produced in evidence varies from that declared on; for the plea admits the identity of the instrument. *Hubbard v. Blow*, 4 Call. (Va.) 224.

§ 5. **Incompetent evidence.** As it regards matters of evidence held incompetent or insufficient to support the declaration under the common counts in *assumpsit*, the following illustrations are given: Matters in aggravation of damages, which occur after suit brought. *Greenleaf v. McColley*, 14 N. H. 303; a written promise of indemnity. *Winton v. Meeker*, 25 Conn. 456; *Smith v. McGehee*, 14 Ala. 404; evidence of claims by one partner against another upon partnership accounts. *Wright v. Cobleigh*, 21 N. H. 339; a non-negotiable note, no consideration appearing on its face. *Saxton v. Johnson*, 10 Johns. 418; a draft on a particular fund, not purporting to be for any consideration, and not a bill, note, order, draft, or check, within the law merchant, *Raiganel v. Ayliff*, 16 Ark. 594; a special contract remaining unperformed. *Maynard v. Tidball*, 2 Wis. 34; an accepted order for the delivery of specified goods. *Burrall v. Jacot*, 1 Barb. 165; drafts drawn on A by B, to prove an indebtedness by B. *Healy v. Gilman*, 1 Bosw. (N. Y.) 235; a letter from the vendee of goods to the vendor, averring that the goods were bought under a guarantee that the vendor would reimburse the vendee any loss that might be sustained, together with an in-

closed account showing the extent of the loss, which letter was not answered. *Fraley v. Bisphan*, 10 Penn. St. 320; and, in an action on a note, evidence of damages arising from breach of the contract on which the note was given. *Cheongwo v. Jones*, 3 Wash. 359.

A declaration for the sale and delivery of *pine* timber is not supported by proof of a sale and delivery of *spruce* timber (*Robbins v. Otis*, 1 Pick. 368); nor an allegation that certain machines were warranted to be good and merchantable, by proof that they were warranted to be equal to any in America (*Goulding v. Skinner*, 1 id. 162); nor a count on a note dated July 28th, by a note dated July 25th (*Stephens v. Graham*, 7 Serg. & R. 405; and see *Church v. Feterow*, 2 Penn. 301); nor a promise to pay \$9.25 a month for twelve months' work, by a promise to pay \$92.50 for ten months' work (*Cranmer v. Graham*, 1 Blackf. [Ind.] 406); nor an agreement between A and B, by an agreement between C and B (*Anderson v. Hays*, 2 Yeates [Penn.], 95); nor a promise to deliver cloth to the plaintiff, by evidence of an agreement to deliver cloth at the defendant's factory (*Clark v. Todd*, 1 D. Chip. [Vt.] 213); and a promise to pay money is not proved by evidence of a promise to deliver certificates of debenture. *Baylies v. Fettyplace*, 7 Mass. 325. And see *Hart v. Tyler*, 15 Pick. 177; *Barton v. Kane*, 17 Wis. 37; *Child v. Bureka, etc., Works*, 44 N. H. 354.

Where a declaration in assumpsit is made against a common carrier, without regard to the bills of lading, they are not applicable to the counts of the declaration, and should not be admitted as evidence in support thereof. *Baltimore, etc., R. R. v. Rathbone*, 1 W. Va. 87.

A will directing payment of a debt alleged to be due the testator by his sons, within a certain time, is not, in itself, such evidence of indebtedness as will support an action of assumpsit against them by the executors. *Zimmerman v. Zimmerman*, 47 Penn. St. 43. And in an action of *indebitatus assumpsit* by a broker, to recover compensation for selling certain property which was fixed by a special contract, evidence to prove the usual rates charged by brokers for services of a like character, is incompetent. *Edwards v. Goldsmith*, 16 id. 43.

If the money counts allege the promise to have been made to pay on demand *with interest*, the action will fail unless an express promise to pay interest is proved. *Tappan v. Austin*, 1 Mass. 31. And if A deliver property to B, on an agreement

which is afterward rescinded, the law implies a promise by B to return the property; and such evidence will not support a count alleging B's promise to refund in money. It is necessary to prove an express promise by B, in order to sustain such count. *Talbot v. Dailey*, 3 Bibb (Ky.), 443.

Where the time of doing a thing is material, it must be proved as laid. But it is otherwise where the time is immaterial. *Jordan v. Cooper*, 4 Serg. & R. 576. And see *Drown v. Smith*, 3 N. H. 301; *Hough v. Young*, 1 Ohio, 504; *Perry v. Botsford*, 5 Pick. 189; *Arnold v. Arnold*, 3 Bing. (N. C.) 81; *Stout v. Russell*, 2 Yeates (Penn.), 334.

§ 6. **Variance.** It is a general rule that the plaintiff in *assumpsit* cannot recover on the special counts in his declaration, when the contract proved is substantially variant from that set out. *Hopper v. Eiland*, 21 Ala. 714. But a variance between the proof and the allegations of the special counts will not bar a recovery upon the common counts. *Staat v. Evans*, 35 Ill. 455.

Where money paid is the alleged consideration of a promise, proof of payment after the promise does not sustain the allegation. *Benden v. Manning*, 2 N. H. 289. And where the consideration alleged was, that the plaintiff would indorse a note, evidence of a promise, in consideration of the plaintiff's having indorsed it, was held to be a fatal variance. *Bulkley v. Landon*, 3 Conn. 404. The same was held where the declaration alleged an undertaking in consideration of the plaintiff's promise to build a ship, and the evidence was of a promise by the plaintiff to finish a ship partly built (*Smith v. Barker*, 3 Day, 312; and see *Harris v. Harris*, 2 Rand. [Va.] 431); and so, where the promise alleged was to render a reasonable account of goods consigned for sale, and the evidence was of a promise to account in a special manner. *Pope v. Barret*, 1 Mas. (C. C.) 123. And see *Blake v. Crowninshield*, 9 N. H. 304; *Leland v. Douglass*, 1 Wend. 490; *Carley v. Dean*, 4 Conn. 259; *Starnes v. Erwin*, 10 Ired. L. (N. C.) 226. A contract must be proved as laid, and the plaintiff cannot give in evidence an entire contract, relating to two subjects, when he declares for one. Where, therefore, the declaration alleged a promise to pay for *half* the land for a highway, and the evidence showed a promise to pay for all the land, it was held that the variance was fatal. *Crawford v. Morrell*, 8 Johns. 253.

Where the declaration set out a contract to carry and deliver an account, and the evidence was of a contract to carry and

deliver a letter containing an account, the variance was held to be immaterial. *Favor v. Philbrick*, 7 N. H. 326. So, in pleading an order to deliver goods to B, it was alleged that the goods were to be delivered to B or order; and this was held not to be a variance, as the words "or order" were not material. *Bailey v. Johnson*, 9 Cow. 115. See, also, *Clap v. Day*, 2 Me. 305; *Ripsher v. Shane*, 3 Yeates (Penn.), 575; *Wroe v. Washington*, 1 Wash. (Va.) 357; *Colgin v. Henley*, 6 Leigh (Va.), 85; *Cunningham v. Kimball*, 7 Mass. 65. And the omission to set forth in a count the manner of payment prescribed in an agreement, cannot be treated as a variance if no question is made in the cause upon that part of the agreement. *Guyon v. Lewis*, 7 Wend. 26.

In assumpsit on a special agreement, it is not a ground of nonsuit that the evidence proves a smaller sum to have been agreed upon between the parties, than is stated in the declaration; for the plaintiff may recover less damages than those laid in the declaration. *Covington v. Lide*, 1 Bay. (S. C.) 158.

ARTICLE VIII.

OF THE DAMAGES IN THE ACTION.

Section 1. In general. The actual damages resulting to the plaintiff from the breach of the contract by the defendant, is the amount of damage which the defendant is liable to pay, and which the plaintiff is justly entitled to recover in an action of assumpsit, for such delinquency. *Doolittle v. McCullough*, 12 Ohio St. 360; *Farrard v. Bouchel*, Harper (S. C.), 83; *Miller v. Hilliard*, Cheves (S. C.), 149; *Doughty v. O'Donnell*, 4 Daly (N. Y.), 60. This is the general rule; but where, from the nature of the contract, no possible mode is left for ascertaining the damage, the court will adopt the only measure of damage which remains, and that is the price agreed to be paid. *Doolittle v. McCullough*, 12 Ohio St. 360; *Coffee v. Meigs*, 9 Cal. 363; *Baldwin v. Bennett*, 4 id. 392. See, generally, on this point, *Berkill v. Keighly*, 15 Mees. & W. 117; *Clark v. Mayor, etc., of New York*, 4 N. Y. (4 Comst.) 338; reversing S. C., 3 Barb. 288; *Moran v. McSwegan*, 1 Jones & Sp. (N. Y.) 350; *Haywood v. Leonard*, 7 Pick. 181; *McLelland v. Snider*, 18 Ill. 58; *Abbott v. Gatch*, 13 Md. 314; *Morris v. Parham*, 4 Phil. (Penn.) 62; *Royalton v. Turnpike Co.*, 14 Vt. 311; *Webb v. Coonce*, 11 Mo. 9.

Where a vendee of goods rightfully offered to return them, but the vendor refused acceptance, and then the vendee kept

and sold them, the rule of damages, in assumpsit by the original vendor, was held to be the amount of the proceeds of such sale, after deducting a fair compensation for the services of the vendee, and not the whole value of the goods. *Greene v. Bateman*, 2 Woodb. & M. 359. And in an action of assumpsit to recover damages for the breach of an agreement to pay money by annual installments, it was held that the verdict could be only for the installments due at the commencement of the action. *Coggeshall v. Coggeshall*, 2 Strobb. (S. C.) 51.

ARTICLE IX.

, ELECTION BETWEEN ASSUMPSIT AND OTHER ACTIONS.

Section 1. Plaintiff may waive tort and bring assumpsit. With respect to personal property, it is a long-established rule that the owner, from whom they have been tortiously taken, may in many cases waive the tort, as it is expressed, and state his demand as arising on contract. See *Lightly v. Clouston*, 1 Taunt. 114; *Howard v. Wood*, 2 Lev. 245; *Hambley v. Trott*, Cowp. 371; *Cummings v. Noyes*, 10 Mass. 433, 436; *Sangster v. Commonwealth*, 17 Gratt. (Va.) 124; *Willet v. Willet*, 3 Watts (Penn.), 277; *McCullough v. McCullough*, 14 Penn. St. 295; *Chambers v. Lewis*, 2 Hilt. (N. Y.) 591; *Isaacs v. Hermann*, 49 Miss. 449. The principle upon which this right to waive the tort and sue in assumpsit rests, is that, as a party cannot set up or take advantage of his own wrong, he cannot be permitted to say he is not liable for the value of the goods, or for the money received on the sale of them, for the reason that his act of appropriation was a tort. *Abbott v. Blossom*, 66 Barb. 353, 356. And one reason given in favor of the action of assumpsit is that it will lie as well against the executor or administrator of the wrong-doer, as against the party himself in his life-time. *Hambley v. Trott*, Cowp. 371; *Oravath v. Plympton*, 13 Mass. 454. So, it is more favorable to the defendant that he should be sued in contract, because that form of action lets in a set-off, and enables him to pay money into court. *Young v. Marshall*, 8 Bing. 43; *Lightly v. Clouston*, 1 Taunt. 114; *Butts v. Collins*, 13 Wend. 156. And in the absence of fraud it relieves him from liability to arrest, under the law of some of the States. See *Abbott v. Blossom*, 66 Barb. (N. Y.) 353, 356; *Roth v. Palmer*, 27 id. 652, 654.

There is considerable difficulty connected with the matter of determining under what circumstances the right of electing between *tort* and *assumpsit* arises. It may, however, be received as a well-settled rule, that when the trespasser has sold or disposed of the property, and received money or money's worth for it, the owner may waive the tort, and affirm the sale, as made on his behalf, and recover the proceeds in an action of *assumpsit*. *Pike v. Bright*, 29 Ala. 332; *Watson v. Stever*, 25 Mich. 386; *Barlow v. Stalworth*, 27 Ga. 517; *Morrison v. Rogers*, 3 Ill. 317; *Staat v. Evans*, 35 id. 455; *Jones v. Hoar*, 5 Pick. 285, and note; *Elliott v. Jackson*, 3 Wis. 649; see 2 Greenl. on Ev. 89, and note. But some doubt has been thrown over the question whether, in the case of a wrongful conversion of the property, the owner can waive the tort and sue the wrong-doer in *assumpsit* as for goods sold and delivered, where the wrong-doer has not sold but retains the goods. Some of the cases hold that he cannot. See *Willet v. Willet*, 3 Watts (Pa.), 277; *Watson v. Stever*, 25 Mich. 386; *Smith v. Smith*, 43 N. H. 536; *Fuller v. Duren*, 36 Ala. 73; *Winchell v. Noyes*, 23 Vt. 303; *McKnight v. Dunlap*, 4 Barb. 36; *Harpending v. Shoemaker*, 37 Barb. 270, 291; *Tryon v. Baker*, 7 Lans. (N. Y.) 511, 514. But the better opinion is said to be, that he may do so, at all events, where the wrong-doer has absolutely used the property for his own benefit, changing its condition and character. See *Abbott v. Blossom*, 66 Barb. 353; *McGoldrick v. Willits*, 52 N. Y. (7 Sick.) 612, 620; *Hill v. Davis*, 3 N. H. 384; *Jones v. Gregg*, 17 Ind. 84; *Chauncey v. Yeaton*, 1 id. 451; *Stockett v. Watkins*, 2 Gill. & J. (Md.) 326, 342; *Butts v. Collins*, 13 Wend. 154; *Alsbrook v. Hathaway*, 3 Sneed (Tenn.), 454. So it has been decided in numerous cases that, upon a fraudulent purchase of goods, the vendor may repudiate the contract as fraudulent and yet maintain an action for goods sold and delivered, on the ground of his right to waive the tortious taking, and bring *assumpsit* for the value. See *Roth v. Palmer*, 27 Barb. 655; *Weigand v. Sichel*, 4 Abb. Ct. App. (N. Y.) 592; S. C., 3 Keyes, 120; 33 How. 174; *Gray v. Griffith*, 10 Watts (Pa.), 431; *Cary v. Hotelling*, 1 Hill, 311, 315; *Benedict v. Nat. Bank of Commonwealth*, 4 Daly (N. Y.), 171; *Blalack v. Phillips*, 38 Ga. 216; *Ascutney Bank v. McOrmsby*, 28 Vt. 721. And it has been held that, where money or goods have been feloniously taken, the action of money had and received will lie against the wrong-doer, before criminal proceedings have been instituted against him. *Boston & Worcester*

R. R. Co. v. Dana, 1 Gray, 83; and see *Benedict v. Nat. Bank of Commonwealth*, 4 Daly (N. Y.), 171. But see, *contra*, *Belknap v. Milliken*, 23 Me. 381. And an infant is held liable in *assumpsit* for money had and received for money tortiously taken by him. *Elwell v. Martin*, 32 Vt. 217. But if the plaintiff waives the tort, he must waive the whole of it; and if his property is wrongfully sold by one assuming to act as his agent, a suit in *assumpsit* against the purchasers ratifies the authority of the agent. *Brigham v. Palmer*, 3 Allen, 450.

As illustrations of the doctrine above stated, it has been held that, where growing wood wrongfully cut and carried away cannot be found to be returned in specie, the owner may waive the tort and sue for its value, as on an implied contract of sale. *Halleck v. Mixer*, 16 Cal. 574. But see *Allen v. Woodward*, 22 N. H. 544. So, in an action for pasturing cattle on the plaintiff's land, if the defendant has been a trespasser, the plaintiff may waive the tort and sue in *assumpsit*. *Welch v. Bagg*, 12 Mich. 42. So, where a person receives property as a pledge and refuses to restore it to the pledgor upon request and performance of the obligation to secure which the pledge was made, an action will lie either in tort or contract. *International Bank v. Monteath*, 39 N. Y. (12 Tiff.) 297. And where goods deposited are wrongfully sold by the bailee, the owner may sue him in trover, or waive the tort and sue in *assumpsit*. *Berley v. Taylor*, 5 Hill (N. Y.), 577. And so, where money is deposited and is converted by the bailee. *Tryon v. Baker*, 7 Lans. (N. Y.) 511. So, where an intruder or trespasser upon a wharf collects wharfage of steamboats, the owner of the wharf may waive the trespass, and recover the amount received in *assumpsit* for money had and received. *O'Conley v. Natchez*, 9 Miss. 31. And in an action upon a contract of warranty, the party injured may elect to declare in tort or in contract. *Humiston v. Smith*, 22 Conn. 19.

And where a person has been unlawfully imprisoned, he may waive the tort and maintain *assumpsit* against the keeper who has derived benefit from his labor. *Patterson v. Crawford*, 12 Ind. 241; *Patterson v. Prior*, 18 id. 440.

If property, owned by several tenants in common, has been converted, they may all waive the tort and join in *assumpsit*, or each one may bring a separate action for his interest, without joining the others. *Tanlkerslig v. Childers*, 23 Ala. 781.

It has been held that *assumpsit*, waiving the tort, cannot be maintained against a trespasser who has cut and carried away

grass, if he has neither sold it nor had any benefit from it but in its use. *Balch v. Patten*, 45 Me. 41. So, where the goods of the plaintiff were wrongfully taken by the defendant, and were destroyed by fire while in his possession, it was held that the plaintiff could not waive the tort and sue in form *ex contractu*. *Schweizer v. Weiber*, 6 Rich. (S. C.) 159. It is likewise held that *assumpsit* cannot be maintained by the owner of a horse against a party who has exchanged it, while in his possession, for another, and has not sold the one received by him in return. *Fuller v. Duren*, 36 Ala. 73. So, if a corporation under legislative authority improves a stream to make it suitable for rafting logs, and the stream and improvements are made use of by another company without permission, the former cannot waive the tort and sue upon an implied promise to pay for such use. *Carson River, etc., Co. v. Bassett*, 2 Nev. 249. And the doctrine which allows the owner of a personal chattel, wrongfully converted by a sale, to waive the tort and bring *assumpsit* for money had and received, can only apply where the owner has a right to the money at the time when the tort is committed. *Jones v. Baird*, 7 Jones' L. (N. C.) 152. And see *Bigelow v. Jones*, 10 Pick. (Mass.) 165; *Turner v. Steam Coal Co.*, 2 Eng. Law & Eq. 342. And where goods are sold on credit, it has been held that the vendor cannot bring *assumpsit* for goods sold before the credit has expired, even though he can prove that the vendee induced him to sell him the goods by fraudulent representations. *Ferguson v. Carrington*, 9 Barn. & C. 59; *Strutt v. Smith*, 1 Crompt. Mees. & R. 312; *Galloway v. Holmes*, 1 Dougl. (Mich.) 330; and see *Allen v. Ford*, 19 Pick. 218. But see *Wigand v. Sichel*, 33 How. (N. Y.) 174; S. C., 3 Keyes, 120; 4 Abb. Ct. App. 592, where it is held that fraud invalidates the clause as to credit, and enables the vendor to sue at once for his money.

In many cases where an action for a tort or *assumpsit* might have been brought by or against the wrong-doer, *assumpsit* is the only remedy for or against his representative. *Ford v. Caldwell*, 3 Hill (S. C.), 248; *Knights v. Quarles*, 2 Brod. & B. 102; *Foster v. Stewart*, 3 M. & S. 202. Thus, if a man take a horse from another and bring him back again, an action of trespass will not lie against his executor though it would against him. *Hambly v. Trott*, Cowp. 375. But an action for the use and hire of the horse will lie against the executor. *Id.* And generally, if it be a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or im-

prisoning a man, etc., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to the testator for the value or sale of the trees he shall. *Ib.* And see *Cravath v. Plympton*, 13 Mass. 454; *Wilbour v. Gilmore*, 21 Pick. 252; *Powell v. Reese*, 7 Ad. & El. 426; *Sinnard v. McBride*, 3 Ham. (Ohio) 264; *Ryan v. Marsh*, 2 Nott & Mc. (S. C.) 156.

Assumpsit cannot be sustained against a public officer, for taking and selling the personal property of the plaintiff, in good faith under color of lawful authority. Accordingly, where the defendant, a collector of taxes, seized and sold the property of the plaintiff for a tax against another person, for which the property was supposed to be liable, but it did not appear whether the defendant had actually received the money on the sale, and the plaintiff brought *assumpsit* for goods sold and money had and received, it was held that he could not recover. *Osborn v. Bell*, 5 Denio, 370. And see *Cushman v. Jewell*, 7 Hun, 525.

§ 2. Election in other cases. A person who is compelled to pay money in consequence of a breach of covenant by another, may recover it back from such person, either in an action of *assumpsit* or *covenant*, at his election. *Douglass v. Waer*, Anth. (N. Y.) 179. See *Weaver v. Bentley*, 1 Caines (N. Y.), 47. And *assumpsit* as well as *case* will lie against a bailee for negligence. *Ferrier v. Wood*, 9 Ark. 85. So, it will lie in many cases where *debt* will lie. *Moses v. McFerlan*, Burr. 1008. Thus, it has been held to lie concurrently with debt on contracts, express or implied, for remuneration for personal services and for all the usual money demands. *Mahaffey v. Petty*, 1 Ga. 261. And either *assumpsit* or *debt* lies on a judgment recovered in a sister State. *Lambkin v. Nance*, 2 Brev. (S. C.) 99; *ante*, 000. So, an action of *assumpsit*, as well as an action of *account*, may be maintained against an agent, when he promises to render an account. *Kellogg v. Griswold*, 12 Vt. 291. And it is held that a recovered lunatic can maintain *assumpsit* against his late guardian for the balance in his hands, notwithstanding he might have a remedy on the guardian's bond. *Shepherd v. Newkirk*, 21 N. J. (Law) 302.

CHAPTER XVII.

ATTACHMENT.

TITLE I.

OF THE REMEDY BY, IN GENERAL.

ARTICLE I.

NATURE OF REMEDY.

Section 1. Origin of. The remedy by attachment, or, in other words, the preliminary attachment of a debtor's property, for the eventual satisfaction of the demand of a creditor, is said to be a proceeding of very early origin. As it regards the modern remedy by attachment, its origin may be readily traced to the custom of Foreign Attachment of London, a custom recognized as existing in the reign of William the Conqueror, and ascribed to a much more remote antiquity. See Locke on Attach. 2 and note; 2 Wait's Pr. 129; *Thayer v. Willett*, 9 Abb. (N. Y.) 325, 341; S. C., 5 Bosw. 344; Bohun, *Privilegia Londini*. The object of the proceeding by custom of foreign attachment of London, is to enable the creditor to attach the money, debts or goods of his debtor in the hands of a third person, and so to deprive the owner of all control over the subject of the attachment until he appears to answer the claim of his creditor, or until the debt is satisfied. Locke on For. Attach. 1, 2. The process is now known in England, and in most of the United States, as *garnishment*, or the garnishee process; but in the New England States it is called the *trustee process*, and in Vermont and Connecticut is also sometimes called *factorizing*, or the factorizing process. As it affects the garnishee, it is in reality a suit by the defendant in the plaintiff's name. *Moore v. Stainton*, 22 Ala. (N. S.) 831; *Travis v. Tartt*, 8 id. 574; see *Malley v. Altman*, 14 Wis. 22; *Thorn v. Woodruff*, 5 Ark. 55. See *M'Grath v. Hardy*, 4 Bing. (N. C.) 785, which contains a clear statement of the proceedings according to the custom of foreign attachment of London.

§ 2. **Remedy in the United States.** The essential principle of the custom of foreign attachment of London has, in some form, become incorporated into the legal systems of all our States, and has given rise to a large body of written and unwritten law. As it exists generally in the United States, the process of attachment may be described as a special statutory remedy, the jurisdiction being exclusively in a court of *law*; and in a case where, from a conflict of jurisdiction, or from other causes, the remedy by attachment is not full and complete, a court of equity has no power to pass or grant any order to aid or perfect it. *McPherson v. Snowden*, 19 Md. 197. And see *Buckley v. Lowry*, 2 Mich. 418; *Williams v. Gage*, 49 Miss. 777; *Curtis v. Steever*, 36 N. J. L. 304. So, it has been described as only an ancillary or provisional remedy, in and dependent on an independent suit. *Fechheimer v. Hays*, 11 Ind. 478; *Marsh v. Williams*, 63 N. C. 371; *Frankenheimer v. Slocum*, 24 Ala. 373; *Furman v. Walter*, 13 How. (N. Y.) 348; *Duncan v. Wickliffe*, 4 Metc. (Ky.) 118; *Maxwell v. Lea*, 6 Heisk. (Tenn.) 247; *Excelsior Fork Company v. Lukens*, 38 Ind. 438; *Toms v. Warson*, 66 N. C. 417. It is in the nature of a proceeding *in rem*. *Megee v. Beirne*, 39 Penn. St. 50; *Mankin v. Chandler*, 2 Brock, 125; *American Bank v. Rollins*, 99 Mass. 313; *Stone v. Miller*, 62 Barb. (N. Y.) 490. And it is held that a statute authorizing proceedings by attachment must be strictly construed. *Caldwell v. Haley*, 3 Tex. 317; *May v. Baker*, 15 Ill. 89; *Groce v. Rittenberry*, 14 Ga. 232; *Frellson v. Stewart*, 14 La. Ann. 832; *McPherson v. Snowden*, 19 Md. 197; *Parker v. Scott*, 64 N. C. 118; *Campbell v. Hall*, McCahon (Kans.), 53. See, however, *Barney v. Patterson*, 6 Harr. & J. (Md.) 182, in which it is held that the proceeding by attachment is not in derogation of the principles of the common law, but rather in mitigation of its severity. See, also, *Perkins v. Norvell*, 6 Humph. (Tenn.) 151.

In some of the States a distinction is made between foreign and domestic attachments, the former being issued against a non-resident of the State and the latter against a resident. Where such a distinction is made, the foreign attachment inures solely to the benefit of the party suing it out, while the avails of the domestic attachment may be shared by other creditors who come into court and present their claims for that purpose. See *Albany City Ins. Co. v. Whitney*, 70 Penn. St. 248; *Fuller v. Bryan*, 20 id. 144. In the States of New England an attachment is an incident of the summons in all actions *ex contractu*. See 1

Bouv. Dict. 163. But in the other States the writ issues only upon cause shown by affidavit. See *Biggs v. Blue*, 5 McLean, 148; *Foster v. Jones*, 1 McCord (S. C.), 116; *Clark v. Garther*, 6 Ala. 139; *Hale v. Chandler*, 3 Mich. 531; *Black v. Brisbin*, 3 Minn. 360; *Courrier v. Cleghorn*, 3 Iowa, 523; *Van Kirk v. Wilds*, 11 Barb. (N. Y.) 520; *Bowen v. Slocum*, 17 Wis. 181; *Pancake v. Harris*, 10 Serg. & R. (Penn.) 109; *Messner v. Hutchins*, 17 Tex. 597. And in most of the States a cautionary or security bond is required to be executed by the plaintiff and sureties, to indemnify the defendant against damage resulting from the attachment. See *Stevenson v. Robbins*, 5 Mo. 18; *Kellogg v. Miller*, 6 Ark. 468; *Davis v. Marshall*, 14 Barb. (N. Y.) 96; *Hucheson v. Ross*, 2 A. K. Marsh. (Ky.) 349; *Ford v. Hurd*, 4 Sm. & M. (Miss.) 683; *Camberford v. Hall*, 3 McCord (S. C.), 345. The grounds upon which the writ issues differ in the various States. But where an affidavit is required as the basis of an attachment, it must verify the plaintiff's cause of action, and also the existence of some one or more of the grounds of attachment prescribed by the local statute as authorizing the issue of the writ. See *Vosburgh v. Welch*, 11 Johns. (N. Y.) 175; *Mott v. Lawrence*, 17 How. (N. Y.) 559; *Pierce v. Smith*, 1 Minn. 82; *McCollem v. White*, 23 Ind. 43; *Manley v. Headley*, 10 Kans. 88; *Fallon v. Ellison*, 3 Neb. 63; *Garner v. White*, 23 Ohio St. 192.

ARTICLE II.

IN WHAT ACTIONS ALLOWED.

Section 1. In general. As a general rule, the issuing of an attachment is allowed only in actions upon an *indebtedness* due on contract expressed or implied. And, although the plaintiff should, in his affidavit for procuring an attachment, allege a cause of action founded on contract, yet if it appears, either from the declaration or the evidence, that the true cause of action is not of that character, it is the duty of the court to dismiss the suit. *Elliott v. Jackson*, 3 Wis. 649. The claim of an attaching creditor need not, however, be so certain as to fall within the technical definition of a debt, or as to be susceptible of liquidation without the intervention of a jury. *Lenox v. Howland*, 3 Caines (N. Y.), 322. If the demand be one arising out of contract, and the contract furnishes a standard by which the amount due could be so clearly ascertained as to enable the plaintiff to

aver it in his affidavit, or the jury by their verdict to find it, an attachment may issue. *Peter v. Butler*, 1 Leigh (Va.), 285; *Wilson v. Wilson*, 8 Gill (Md.), 192; *Weaver v. Puryear*, 11 Ala. (N. S.) 941; *Hunt v. Norris*, 4 Mart. (La.) 517; *Bausman v. Smith*, 2 Ind. 374. See *Strock v. Little*, 45 Penn. St. 416; *Porter v. Hildebrand*, 14 id. 129; *New Haven Saw-Mill Co. v. Fowler*, 28 Conn. 103. And in some of the States an attachment may, in certain cases, issue upon a debt not yet due and payable. But it must be an actual subsisting debt, which will become due by the efflux of time, and not be merely possible, and dependent on a contingency that may never happen. *Taylor v. Drane*, 13 La. 62; *Henderson v. Thornton*, 37 Miss. 448; *Benson v. Campbell*, 15 Ala. 455; *Bacon v. Marshall*, 37 Iowa, 581; *Cox v. Reinhardt*, 41 Texas, 591. See *Brace v. Grady*, 36 Iowa, 352; *Jones v. Holland*, 47 Ala. 732.

ARTICLE III.

IN WHAT ACTIONS NOT ALLOWED.

Section 1. In general. The remedy by attachment is very generally restricted by statute to *creditors*; hence, it has been uniformly held not to lie where the *gravamen* of the action is a *tort*. Thus, an attachment does not lie in an action of trespass (*Ferris v. Ferris*, 25 Vt. 100. See *Linscott v. Fuller*, 57 Me. 406); or trover (*Marshall v. White*, 8 Porter [Ala.], 551); nor for assault and battery (*Thompson v. Carper*, 11 Humph. [Tenn.] 542); nor for a malicious prosecution (*Tarbell v. Bradley*, 27 Vt. 535); nor in an action against a common carrier, to recover damages for the loss of goods by his negligence (*Atlantic Mut. Ins. Co. v. McLoon*, 48 Barb. [N. Y.] 27; *Porter v. Hildebrand*, 14 Penn. St. 129); nor in an action for breach of promise of marriage (*Barnes v. Buck*, 1 Lans. [N. Y.] 268. See *Morton v. Pearman*, 28 Ga. 323); nor in an action to recover back money deposited under an executory contract, on the ground of fraud (*Knapp v. Meigs*, 11 Abb. N. S. [N. Y.] 405); nor in an action to recover damages alleged to have been sustained by the plaintiff, in consequence of a wrongful sale of his property under execution. *Greiner v. Prendergast*, 3 La. Ann. 376. See, also, *Prewitt v. Carmichael*, 2 id. 943; *Griswold v. Sharpe*, 2 Cal. 17; *Strock v. Little*, 45 Penn. St. 416; *Saddlesvene v. Arms*, 32 How. (N. Y.) 280. Where articles of agreement for the exchange of property, provided that if either party

failed to comply with the conditions of the contract he should pay to the other a named sum, or more, if more damage should be proved, as fixed or liquidated damages, it was held that the sum named in the contract was in the nature of a penalty, and could not be recovered, as liquidated damages by attachment. *Hough v. Kugler*, 38 Md. 186. See *Crossman v. Lindsley*, 42 How. (N. Y.) 107.

It has been held in Louisiana that an action by attachment, by one general partner against another, for an amount alleged to be due, growing out of the transactions of the partnership, cannot be maintained (*Levy v. Levy*, 11 La. 581); and the same has been held in South Carolina. *Rice v. Beers*, 1 Rice's Dig. 75. But in Ohio, under a statute authorizing an attachment in an action "for the recovery of money," it was held that it might be resorted to in an action by one partner against his copartner, after the dissolution of the firm, to recover a general balance claimed upon an unsettled partnership account. *Goble v. Howard*, 12 Ohio St. 165; and see *Ward v. Howard*, id. 158; *Kerr v. Hoffman*, 65 Penn. St. 126. And in Minnesota, under a statute using the same terms as the Ohio statute, it was held that an attachment might be resorted to in any action, either *ex contractu* or *ex delicto*. *Davidson v. Owens*, 5 Minn. 69. In some of the States, as in Georgia, suits by attachment are authorized by statute, "in all cases of money demands, whether arising *ex contractu* or *ex delicto*." See *Monroe v. Bishop*, 29 Ga. 159; *Morton v. Pearman*, 28 id. 323. And under this provision it was held, that an attachment could be resorted to in an action for breach of a promise of marriage. *Ib.*

That an attachment does not lie, in an equitable action, or in a suit for purely equitable relief. See *Ebner v. Bradford*, 3 Abb. N. S. (N. Y.) 248; *Guilhon v. Lindo*, 9 Bosw. (N. Y.) 601. It will not lie in a suit for an injunction and damages (*Id.*); nor in a suit for the foreclosure of a mortgage. *Van Wyck v. Bauer*, 9 Abb. N. S. (N. Y.) 42. But in a proceeding by attachment *in chancery*, as authorized by the laws of Virginia, it was held that a guarantor might maintain a bill against the principal debtor, in order to protect himself against loss by reason of the debtor's failure, before he has actually been subjected to liability as guarantor. *Moore v. Holt*, 10 Gratt. (Va.) 284.

Under the practice which has prevailed in the district court for the southern district of New York, attachment may be issued in aid of a common-law information prosecuted by the United States. *United States v. Stevenson*, 1 Abb. (U. S.) 495.

ARTICLE IV.

IN WHOSE FAVOR ISSUED.

Section 1. In general. Resort to the remedy by attachment is in general allowed only to a *creditor*. And a creditor is defined to be one "who has a right to require the fulfillment of an obligation or contract." 1 Bouv. Dict. 409. And see 1 Burr. Dict. 399; *Mill-dam Foundry v. Hovey*, 21 Pick. (Mass.) 417, 455; *Carver v. Braintree Man. Co.*, 2 Story, 432. In the absence of any statutory provision to the contrary, non-residents, as well as residents, may avail themselves of the remedy to secure debts due them. *Ward v. McKenzie*, 33 Tex. 297; *Tyson v. Lansing*, 10 La. 144; *Graham v. Bradbury*, 7 Mo. 281; *Calhoun v. Cozens*, 3 Ala. 21; *Ready v. Stewart*, 1 Code R. (N. S.) N. Y. 297. And the right to the remedy passes as an incident of the demand by a general assignment thereof, to the assignee. *Whitman v. Keith*, 18 Ohio St. 134; *McBride v. Farmers' Bank*, 26 N. Y. (12 Smith) 450. So, it has been held that the assignee of a chose in action may sue a foreign corporation by attachment, though his assignor was not entitled to such process. *Id.*

ARTICLE V.

AGAINST WHOM ISSUED.

Section 1. In general. The persons against whom attachments are generally authorized may be classed under the heads of absent, absconding, concealed and non-resident debtors. And corporations, like natural persons, may incur a liability to the process of attachment. *Libbey v. Hodgdon*, 9 N. H. 394; *Bowen v. Bank of Medina*, 34 How. (N. Y.) 408; *Andrews v. Michigan Central R. R. Co.*, 99 Mass. 534. Where several persons are liable for the same debt, any one or more of them, in relation to whom any ground of attachment exists, may be proceeded against by attachment, without so proceeding against the others. *Austin v. Burgett*, 10 Iowa, 302; *Chittenden v. Hobbs*, 9 id. 417; *Brewster v. Honigsburger*, 2 Code R. (N. Y.) 50.

§ 2. Absent debtors. The issuing of an attachment is never justifiable upon a mere casual and temporary absence of a debtor. See *Pitts v. Burroughs*, 6 Ala. 733; *Mandell v. Peet*, 18 Ark. 236; *Watson v. Pierpont*, 7 Mart. (La.) 413. It must be

an absence of such a character that the ordinary process of law cannot be served on the debtor. See *Clark v. Pratt*, 19 La. Ann. 102; *Matter of Thompson*, 1 Wend. (N. Y.) 43; *Fuller v. Bryan*, 20 Penn. St. 144; *Morgan v. Avery*, 7 Barb. (N. Y.) 656.

And it has been held, that where the absence is such, that if a summons issued upon the day the attachment is sued out, will be served upon the defendant in sufficient time before the return day to give the plaintiff all the rights which he can have at the return term, the defendant has not so absented himself as that the ordinary process of law cannot be served upon him. *Ellington v. Moore*, 17 Mo. 424; *Kingsland v. Worsham*, 15 id. 657; *Fitch v. Waite*, 5 Conn. 117. In Kentucky, the term "absent defendants" was held to include only such as were, at the commencement of the suit, actually absent from the State. *Clark v. Arnold*, 9 Dana, 305. And under the statute of the same State, authorizing an attachment where the debtor "has been absent from the State four months," it was held that where the debtor leaves his home, with the intention of going out of the State, and consummates his purpose, being absent from his home, pursuant to such intention, for the period of four months, it must be regarded as an absence from the State, and a ground for an attachment, although some unlooked-for casualty may have delayed him a few days from passing beyond the territorial boundary of the State. *Spalding v. Simms*, 4 Metc. (Ky.) 285.

§ 3. **Absconding debtors.** To abscond, in a legal sense, means to hide, conceal, or absent one's self clandestinely, with the intent to avoid legal process. *Bennett v. Avant*, 2 Sneed (Tenn.), 152; and see *Ives v. Curtis*, 2 Root (Conn.), 133. And if a person departs from his usual residence, or remains absent therefrom, or conceals himself in his house, so that he cannot be served with process, with intent unlawfully to delay or defraud his creditors, he is an absconding debtor. But if he depart from the State, or from his usual abode, with the intention of again returning, and without any fraudulent design, he has not absconded, within the intendment of the law. *Fitch v. Waite*, 5 Conn. 117; and see *Oliver v. Wilson*, 29 Ga. 642; *House v. Hamilton*, 43 Ill. 185; *Boardman v. Bickford*, 2 Aik. (Vt.) 345. There must be an *intent* to abscond; and a public and open removal, or a departure without such intent, will not constitute an absconding. *Id.*; *Matter of Fitzgerald*, 2 Caines (N. Y.), 318. It has been held, however, that if the purpose to remove exists, and may be carried out in one, two, three or several weeks or

months, and the object is to evade or delay creditors, the writ may issue. And this purpose, like all other motives, may be inferred from the speeches, acts, and conduct of the party, although his movements may not be characterized by "fright," "speed" or "haste." *Myers v. Farrell*, 47 Miss. 281; and see *Ross v. Clark*, 32 Mo. 296. Under the statute of Illinois, authorizing an attachment to issue in case a "debtor conceals himself, etc., so that process cannot be served upon him," it is not necessary that process should be first served, or that an attempt should be made by an officer to find the debtor. If he conceals himself so that an attempt to serve process would be useless, it is sufficient. *North v. McDonald*, 1 Biss. 57. "Absconding and concealing," as used in the Kansas Code of Procedure, refer to such conduct only as prevents the service of process in the State. *Hoggett v. Emerson*, 8 Kans. 262.

The act of absconding is a personal act, and can be alleged only of him who has done it. An attachment cannot, therefore, be sustained against a partnership, as absconding or concealed debtors, unless all the members of the firm have absconded, or have kept concealed. *Leach v. Cook*, 10 Vt. 239; and see *Bryant v. Simoneau*, 51 Ill. 324. And as "concealment," such as will authorize an attachment, must be with the intent to defeat or delay the claims of creditors, by avoiding the service of process, one who conceals himself for the purpose of avoiding a criminal prosecution is not within the purview of the law. *Lynde v. Montgomery*, 15 Wend. 461; *Evans v. Saul*, 8 Mart. N. S. (La.) 247; but see *Mayor of New York v. Genet*, 4 Hun, 487.

§ 4. Removal, or fraudulent disposition of property by debtors. Allegations of dissipated habits, great improvidence and utter insolvency, and of the plaintiff's belief that the defendant "will dispose of" his property in order to defraud his creditors, have been held insufficient to make out a case for an attachment. *Jackson v. Burke*, 4 Heisk. (Tenn.) 610. So, a shipment of cotton from Alabama by the usual route, for the honest purposes of trade, by a citizen who has means in the State sufficient to pay all his debts, will not justify the issuing of an attachment against his estate, on the ground that he is about to remove his property out of the State, so that the plaintiff will probably lose his debt, or have to sue for it in another State. *Stewart v. Cole*, 46 Ala. 646; and see *Montague v. Gaddis*, 37 Miss. 453; *Runyan v. Morgan*, 7 Humph. (Tenn.) 210. An affidavit which states that the affiant has good reason to believe, and does believe,

that the debtor has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal, *any* of his property, with intent to defraud his creditors, and merely following the words of the statute, is not sufficient to authorize the issuing of an attachment against the debtor's property. *Miller v. Munson*, 34 Wis. 579; S. C., 17 Am. Rep. 461. But where an attachment was obtained on the ground that the defendant was about to fraudulently conceal, remove, or dispose of his property or effects, so as to hinder or delay his creditors, it was held not necessary to show that he was about so to dispose of *all* his property, but that the attachment would be sustained, if he was about so to dispose of any part of it. *Taylor v. Myers*, 34 Mo. 81. Under the Kansas civil code, the assignment of any portion of a debtor's property, for the purpose of defrauding his creditors, is a ground for an order of attachment. *Johnson v. Laughlin*, 7 Kans. 359. And in Oregon an attachment will be granted against the goods of a debtor who is about to dispose of them with intent to delay or defraud the plaintiff in the action, without reference to the defendant's conduct or purpose as to his other creditors. *Haiglette v. Leake*, Deady, 469.

To sustain an attachment *in chancery*, it is necessary to show a fraudulent intent before the suing out of the attachment. To prove it to have originated afterward will not be sufficient. *Warner v. Everett*, 7 B. Monr. (Ky.) 262.

A threat by a debtor that he would assign and put his property out of his hands, made in words which may be construed to mean that he would make a lawful assignment, is not, without any evidence of contemporaneous or subsequent acts showing a fraudulent intent, a sufficient ground for an attachment. *Wilson v. Britton*, 26 Barb. (N. Y.) 562; S. C., 6 Abb. 97; and see *Dickinson v. Benham*, 10 id. 390; S. C., 19 How. 410. But see *Gasherie v. Apple*, 14 Abb. (N. Y.) 64. And where a debtor refused to pay his note on demand, and was told by the creditor that he would be sued, and that the debtor thereupon threatened that if he was sued, he would turn over all his property, and that the creditor "would not get a cent," it was held that this threat evidenced an intention to dispose of his property so as to baffle the creditor in the speedy collection of his debt, and the attachment was sustained. *Livermore v. Rhodes*, 3 Rob. (N. Y.) 626; S. C., 27 How. 506.

§ 5. *Non-resident debtors.* The non-residence of the debtor is a common statutory ground authorizing an attachment to issue

against him, but mere temporary absence from the State, on business or pleasure, of one who has a domicile therein, does not make such person a non-resident within the meaning of the attachment law. *Alston v. Newcomer*, 42 Miss. 186; see *Meek v. Fox*, id. 513. And it has been held that a departure from home with intent to return, though followed by many years' absence, but without any unequivocal act signifying a purpose to change the domicile, will not defeat one's claim to the protection of his property from seizure as property of a non-resident. *Egan v. Lumsden*, 2 Dis. (Ohio) 168. He must have a fixed abode elsewhere, with the intention of remaining there, for a definite period, for business or other purposes. *Alston v. Newcomer*, 42 Miss. 186; *Perrine v. Evans*, 35 N. J. L. 221; *Hennen v. Hennen*, 12 La. 190; *Pfoutz v. Comfort*, 36 Penn. St. 420; see *Robbins v. Alley*, 38 Ind. 553.

The remedy by attachment against a non-resident is not defeated by his accidental or transient presence within the State (*Jackson v. Perry*, 13 B. Monr. [Ky.] 231); nor by the fact that he is engaged in business therein, when his personal domicile is in another State. *Rayne v. Taylor*, 10 La. Ann. 726; *Perrine v. Evans*, 35 N. J. L. 221. Thus, it is held that one who carries on business in the State of New York, but who maintains his family in another State, and frequently resorts to his home with them there, may be deemed a non-resident of New York within the attachment laws of that State, although he has furnished apartments at his place of business in New York, and habitually lodges and takes his meals there. *Murphy v. Baldwin*, 41 How. (N. Y.) 270; S. C., 11 Abb. (N. S.) 407. See, also, *Barry v. Bockover*, 6 Abb. (N. Y.) 374; *Lee v. Stanley*, 9 How. (N. Y.) 272. So, a non-resident of Georgia, who is lessee of a railroad in that State, and liable to be sued as a railroad company, is not, on that account, exempted from proceedings by attachment, like other non-residents. *Breed v. Mitchel*, 48 Ga. 533.

If one of two partners is a non-resident, this is held to authorize an attachment against him, leviable upon his interest in the partnership property. *McHenry v. Cawthorn*, 4 Heisk. (Tenn.) 508. See *Loddell v. Bushnell*, 24 La. Ann. 295; *Conklin v. Harris*, 5 Ala. 213; *Wiley v. Sledge*, 8 Ga. 532. And under the laws of Kansas, where one of two contractors is a non resident of the State and the other a resident, an attachment may be sued out and maintained against the former. *Jefferson County v. Swain*, 5 Kans. 876.

Where one had conveyed away his property in trust to pay his debts, and had left his place of residence with the intention of removing from the State, the court held that he was a non-resident in the sense of the Virginia attachment law, although he was within the State at the time of the attachment. *Clark v. Ward*, 12 Gratt. (Va.) 440. And in the attachment law of the State of Maryland, the word *citizen* is used in reference to persons liable to be proceeded against by attachment, and it was held that an unauthorized alien residing and doing business in the State, is for commercial purposes a "citizen" in contemplation of the attachment laws. *Field v. Adreon*, 7 Md. 209. See *Riserwick v. Davis*, 19 id. 82. In Georgia, under a statute authorizing an attachment of the goods of a defendant "actually removing out of the county," it was held that the goods of one not a resident of the State, but who was passing through it, could be attached. *Johnson v. Lowry*, 47 Ga. 560; S. C., 15 Am. Rep. 655.

One who enlists in the volunteer military service of the United States, or who is drafted into such service, and departs from the place of his domicile to a point out of the State, in the performance of military duty, with an intention to return at the expiration of his term of service to his former abode, does not thereby lose his residence within the State. *Tibbitts v. Townsend*, 15 Abb. (N. Y.) 221. But if a person voluntarily absents himself from his residence or country with the intention of engaging in hostilities against the latter, he cannot be permitted to complain of legal proceedings regularly prosecuted against him as an absentee, on the ground of his inability to return or to hold communication with the place where the proceedings are conducted. *Ludlow v. Ramsey*, 11 Wall. (U. S.) 581; *Foreman v. Carter*, 9 Kans. 674.

One who has been convicted of a serious criminal offense, and who escapes before sentence and keeps concealed, so that no efforts to find him are successful, is a non-resident in such a sense that an attachment may be issued against his property. *Mayor of New York v. Genet*, 4 Hun, 487.

As the legal residence of a wife follows that of her husband (*Williams v. Saunders*, 5 Cold. [Tenn.] 60; *Greene v. Greene*, 11 Pick. [Mass.] 411; *Sanderson v. Ralston*, 20 La. Ann. 312); she may, conjointly with him, be proceeded against by attachment as a non-resident of the State in which she actually

resides, if her husband be a resident of another State. *Hackettstown Bank v. Mitchell*, 4 Dutch. (N. J.) 516.

See the questions of residence and domicile in connection with attachment laws, discussed in *Brown v. Ashbough*, 40 How. (N. Y.) 260; *Moore v. Holt*, 10 Gratt. (Va.) 284; *McCollem v. White*, 23 Ind. 43; *Farrow v. Barker*, 3 B. Monr. (Ky.) 217; *Nailor v. French*, 4 Yeates (Penn.), 241.

§ 6. **Corporations.** Doubts have been entertained as to the liability of corporation to attachment; and in an early case in New York the Supreme Court set aside an attachment on the ground that a statute which authorized attachments against the estates of non-resident debtors, generally, did not apply to foreign corporations. *McQueen v. Middletown Man. Co.*, 16 Johns. 5. And the same principle has been elsewhere recognized. See *Peckham v. North Parish, etc.*, 16 Pick. (Mass.) 286; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *Clark v. New Jersey Steam Nav. Co.*, 1 Story, 531. The contrary doctrine has, however, been announced in the decisions of the courts of many of the States, and it may be regarded as settled, that corporations, like natural persons, may be proceeded against by attachment. See *Libbey v. Hodgdon*, 9 N. H. 394; *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Mo. 421; *Wilson v. Danforth*, 47 Ga. 676; *Bushel v. Com. Ins. Co.*, 15 Serg. & Rawle, 173; *Martin v. Branch Bank*, 14 La. 415; *Union Bank v. U. S. Bank*, 4 Humph. (Tenn.) 369; *Mineral Point R. R. Co. v. Keep*, 22 Ill. 9; *First National Bank v. Colby*, 46 Ala. 435; *Andrews v. Michigan Central R. R. Co.*, 99 Mass. 534. In some of the States corporations are expressly subjected by statute to attachment process. See *Barnett v. Chicago & Lake Huron R. R. Co.*, 4 Hun (N. Y.), 114; S. C., 6 N. Y. S. C. (T. & C.) 358; *Ahern v. National Steamship Co.*, 11 Abb. N. S. (N. Y.) 356; S. C., 3 Daly, 399.

§ 7. **Persons in a representative capacity.** It is the general rule, that representative persons, such as heirs, executors, administrators, trustees, and others, claiming merely by right of representation, are not liable to be proceeded against, as such, by attachment. *Jackson v. Walsworth*, 1 Johns. Cas. (N. Y.) 372; *Taliaferro v. Lane*, 23 Ala. 369; *Peacock v. Wildes*, 3 Halst. (N. J.) 179; *Matter of Hurd*, 9 Wend. (N. Y.) 465; *Williamson v. Beck*, 1 Leg. Gaz. Rep. (Penn.) 200; see *Holloway v. Chiles*, 40 Ga. 346. But where an executor or administrator, in the course of the discharge of his duties as such, becomes person-

ally liable, the rule is otherwise. *Matter of Galloway*, 21 Wend. (N. Y.) 32; *Miller v. Knox*, 48 N. Y. (3 Sick.) 232. So, a creditor of an absent debtor, who is one of the heirs and distributees of a deceased intestate, in Virginia, may go into a court of equity for the purpose of having a division and distribution of the estate of the decedent, and of procuring payment of his debt, out of the share of the absent debtor in the estate. *Moore v. White*, 3 Gratt. 139; and see *Carrington v. Didier*, 8 id. 260.

ARTICLE VI.

WHAT PROPERTY MAY BE TAKEN

Section 1. Real estate. The interests in real estate which may be subject to attachment, the requisites of an attachment of real estate, etc., are matters very much dependent on the law of each State. But the general principle, that whatever may be sold under execution may be attached, applies as well to real as to personal property. See *Spencer v. Blaisdell*, 4 N. H. 198; *Lee v. Hunter*, 1 Paige (N. Y.), 519; *Doyle v. Sleeper*, 1 Dana (Ky.), 531; *Bullene v. Hiatt*, 12 Kans. 98. So, in the absence of any positive limitation of the right of attachment, an attachment of real estate is valid, although the defendant has personal property sufficient to satisfy the demanded debt. *Isham v. Downer*, 8 Conn. 283; see *Weathers v. Mudd*, 12, B. Monr. (Ky.) 112. It is, however, an established principle, peculiarly applicable to attachments of real estate, that the attachment can operate only upon the right of the debtor existing at the time it is made. *Crocker v. Pierce*, 31 Me. 177. And no subsequently-acquired title of the debtor can be held by it. *Id.* It follows that the levy of an attachment upon real estate, after the defendant in the attachment has conveyed by deed, is ineffectual as against the grantee in the deed. And the facts that the deed has not been recorded, and that the attaching creditor had no notice of the sale, are held to be immaterial. *Plant v. Smythe*, 45 Cal. 161; *Cox v. Milner*, 23 Ill. 476. As it regards the question, whether a mortgagee of real estate has an attachable interest therein, it would seem to be the settled doctrine that, before an entry for condition broken, with a view to foreclosure, he has not. See *Thornton v. Wood*, 42 Me. 282; *Fay v. Cheney*, 14 Pick. (Mass.) 399. And it has also been held that the interest of a mortgagee cannot be attached any more after entry than before. *Smith v.*

People's Bank, 24 Me. 185; see *Courtney v. Carr*, 6 Iowa, 238; *Lane v. Marshall*, 1 Heisk. (Tenn.) 30. That the equitable interest of a debtor, in real property, is subject to attachment, as well as the absolute right to real property under a legal title. See *Lee v. Hunter*, 1 Paige (N. Y.), 519; *Bullene v. Hiatt*, 12 Kans. 98.

One who occupies land under a contract of purchase, with the right to cut and sell wood growing thereon, upon condition of accounting to the owners, for the receipts, after reimbursing his expenses, has no attachable interest in the wood. *Provis v. Cheves*, 9 R. I. 53.

§ 2. **Personal property.** The personal property subject to attachment includes generally all that property of the defendant not included in the term "real estate," which is subject to execution. And it is stated as a general rule, that whatever may be levied on and sold under execution may be attached. *Spencer v. Blaisdell*, 4 N. H. 198; *Smith v. Orser*, 42 N. Y. (3 Hand) 132. Thus, money may be attached *in specie*. *Turner v. Fendall*, 1 Cranch, 117; *Prentiss v. Bliss*, 4 Vt. 513. So, bank notes may be attached. *Spencer v. Blaisdell*, 4 N. H. 198. And it has been said that treasury notes of the United States may be also attached. *State v. Lawson*, 7 Ark. (2 Eng.) 391. In short, every thing belonging to the debtor whether of a tangible nature or not, except *choses in action*, and articles expressly exempted by statute, may be the subject of attachment. See *Handy v. Dobbin*, 12 Johns. (N. Y.) 220. And the tendency now is, in many of the States, to authorize the attachment of things in action, by express statute. See *Coddington v. Gilbert*, 17 N. Y. (3 Smith) 489; *Russell v. Ruckman*, 3 E. D. Smith (N. Y.), 419; *Brower v. Smith*, 17 Wis. 410; *Haley v. Reid*, 16 Ga. 437.

ARTICLE VII.

WHAT PROPERTY EXEMPT FROM.

Section 1. In general. Property exempt by law from execution cannot be attached (*Halsey v. Whitney*, 4 Mason, 206; *Davis v. Garret*, 3 Jred. [N. C.] 459; *Pierce v. Jackson*, 6 Mass. 242); without the consent of the defendant (see *Dow v. Cheney*, 103 Mass. 181; *Colson v. Wilson*, 58 Me. 416); or unless he be proceeded against as a non-resident. *Yelverton v. Burton*, 26 Penn. St. 351. See *State v. Manly*, 15 Ind. 8; *Scott v. Brigham*,

27 Vt. 561. Nor can property, the sale of which is penal, be attached. *Nichols v. Valentine*, 36 Me. 322. And if property be so situated that the defendant has lost his power over it, as in the case of a chattel pawned or mortgaged (*Sargeant v. Carr*, 12 Me. 396; *Anderson v. Doak*, 10 Ired. [N. C.] 295); or personally leased for a term of years (*Smith v. Niles*, 20 Vt. 315. See *Hughes v. Kelly*, 40 Conn. 148); or goods upon which freight is due (*De Wolf v. Dearborn*, 4 Pick. [Mass.] 466); or property in the hands of a bailee for hire (*Hartford v. Jackson*, 11 N. H. 145; *Gregg v. Nilson*, 1 Leg. Gaz. Rep. [Penn.] 128); it cannot be attached for his debt. Personal property in the possession of a bailee, having a lien thereon, cannot be taken out of his possession by virtue of an attachment against the bailor. *Truslow v. Putnam*, 4 Abb. Ct. App. (N. Y.) 425. So property mortgaged with a right of possession in the mortgagor, may, before forfeiture, be taken on an attachment against the mortgagor's property. *Hall v. Sampson*, 23 How. 84; 35 N. Y. (8 Tiff.) 274; *Fairbanks v. Bloomfield*, 5 Duer, 434; *Hamill v. Gillespie*, 48 N. Y. (3 Sick.) 556. But if such possessory right determines while the property mortgaged is in the hands of the sheriff, the property must be released to the mortgagee. *Ib.* So, as a general rule, property cannot be attached as the property of a debtor before his right to such property has become fully vested, or while such right is contingently vested in another. See *Buckmaster v. Smith*, 22 Vt. 203; 2 Wait's Pr. 162. Thus, goods shipped to a purchaser are not subject to an attachment against him while the right of stoppage *in transitu* remains in the vendor. *Jones v. Bradner*, 10 Barb. (N. Y.) 193; *O'Brien v. Norris*, 16 Md. 122. And where property is sold and delivered, upon condition that the title shall not vest in the vendee, unless the price agreed upon be paid within a specified time, the vendee has no attachable interest in the property until performance of the condition. *McFarland v. Farmer*, 42 N. H. 386. So, property lent to one cannot be attached for his debt (*Chase v. Elkins*, 2 Vt. 290); nor can property consigned to a factor be attached for his debt, though he have a lien on it. *Holly v. Huggeford*, 8 Pick. (Mass.) 73. And if one acquires, by purchase, the possession of personal property by fraudulent means, he has not such title thereto as will enable his creditors to attach and hold it as against the party from whom it was fraudulently procured. *Bradley v. Obear*, 10 N. H. 477; *Galbraith v. Davis*, 4 La. Ann. 95; *Buffington v. Gerrish*, 15

Mass. 156; *Thompson v. Rose*, 16 Conn. 71. See *Pond v. Skidmore*, 40 Conn. 213.

Property in the custody of the law is exempt from attachment. Thus, money received by an officer, in satisfaction of an execution, is in the custody of the law, and cannot be levied on under an attachment against the creditor, so long as it remains in the hands of the officer. *Baker v. Kentworthy*, 41 N. Y. (2 Hand) 215; *Burroughs v. Wright*, 16 Vt. 619; *Burlingame v. Bell*, 16 Mass. 318. So, money paid into court (*Farmers' Bank v. Beaton*, 7 Gill & J. [Md.] 421); or into the hands of a clerk or prothonotary of a court on a judgment (*Ross v. Clarke*, 1 Dall. [Penn.] 354; *Allston v. Clay*, 2 Hayw. [N. C.] 171; *Hunt v. Stevens*, 3 Ired. [N. C.] 365); being in the custody of the law, cannot be attached. *Ib.* The same is true of goods held by a collector of the revenue of the United States, to enforce the payment of the duties thereon. *Harris v. Dennie*, 3 Pet. (U. S.) 292. But property unlawfully seized by an officer and held by him, is not in the custody of the law, and may be attached at the suit of a creditor of the owner of the property so held. See *Fairbanks v. Bloomfield*, 5 Duer (N. Y.), 434, 445; *Watson v. Todd*, 5 Mass. 271. Property held by an officer under attachment from a State court, is not liable to be seized under process from a United States court (*The Orpheus*, 3 Ware, 143); nor can property attached by an officer of the latter be taken out of his hands by an officer under process issued by the former. *Freeman v. Howe*, 24 How. (U. S.) 450; *Lewis v. Buck*, 7 Minn. 104; *Moore v. Wittenburg*, 13 La. Ann. 22.

Private papers and books of account are exempt from attachment. *Oystead v. Shed*, 12 Mass. 506; *Bradford v. Gillaspie*, 8 Dana (Ky.), 67. So is property of a peculiarly perishable nature. *Wallace v. Barker*, 8 Vt. 440; *Norris v. Watson*, 2 Foster (N. H.), 364; *Penhallow v. Dwight*, 7 Mass. 34. And goods which cannot be returned in the same plight, such as hides in vats in process of tanning (*Bond v. Ward*, 7 Mass. 123); or a burning pit of charcoal, are not liable to attachment. *Wild v. Blanchard*, 7 Vt. 188. See *Hale v. Huntley*, 21 id. 147. The property liable to seizure upon attachment is generally specified by statute, which prescribes the rule to be followed in levying the attachment.

The attachment, knowingly, of a mail-coach and horses, while carrying the mail, has been held void. *Harmon v. Moore*, 59 Me. 428. But where a steamboat was attached, which was ordi-

narily employed by her owner in transporting the mail between two points, but at the time of the attachment was not so engaged, and had not a mail on board, the attachment was sustained. *Parker v. Porter*, 6 La. 169. And see *Boston, C. & M. R. R. Co. v. Gilmore*, 37 N. H. 410; *Briggs v. Strange*, 17 Mass. 405; *Potter v. Hall*, 3 Pick. (Mass.) 368; *Bell v. Douglass*, 1 Yerg. (Tenn.) 397. As statutes of exemption are to be liberally construed, it has been held that a horse generally used "for team work" should be exempt from attachment, although he is not kept for that purpose exclusively. *Webster v. Orne*, 45 Vt. 40.

ARTICLE VIII.

REMEDIES FOR ILLEGAL ATTACHMENT OR SEIZURE.

Section 1. By action on attachment bond. In many of the States a cautionary or security bond is required to be executed by the plaintiff and sureties, to indemnify the defendant against damage resulting from the attachment. The effect of the execution of such a bond is, to afford the defendant recourse against the plaintiff on the bond, for a wrongful attachment, where there existed no malice in suing it out. The party whose property is attached may find the proceeding wrongful and vexatious, and the suing it out may be ruinous to his credit and circumstances, though obtained without the least malice toward him. If the plaintiff, under color of the process, does, or procure to be done, what the law has not authorized, and the defendant is thereby injured, it seems clear that he is, in such case, as much as in any other, entitled to redress from the party whose illegal or *wrongful* act has occasioned the injury, although it may have been done without malice. *Wilson v. Outlaw*, Minor (Ala.), 367; *Seay v. Greenwood*, 21 Ala. 491; *Dunning v. Humphrey*, 24 Wend. 31; *Tallant v. Burlington Gas-light Co.*, 37 Iowa, 261; *Williams v. Hunter*, 3 Hawks (N. C.) 545. But it is held that no action lies for *irregularly* suing out an attachment. *Id.*; *Sharpe v. Hunter*, 16 Ala. 765. So, a mere failure to prosecute the suit does not give an action on the bond. The order must have been procured wrongfully and without just cause to constitute a breach of the condition, although the plaintiff may have abandoned the prosecution of the suit. *Pettit v. Mercer*, 8 B. Monr. (Ky.) 51; *Smith v. Story*, 4 Humph. (Tenn.) 169. But see *Cox v. Robinson*, 2 Rob. (La.) 313.

And an action may be sustained on the undertaking, if the prosecution of the attachment can be shown to be wrongful and oppressive, even though the plaintiff in the attachment succeeded in that proceeding. *Harper v. Keys*, 43 Ind. 220.

The bond is required simply for the benefit of the party against whom the writ issues, and he only can maintain an action on the bond. *Raspillier v. Brownson*, 7 La. 231; *Davis v. Commonwealth*, 13 Gratt. (Va.) 139. But in case of a bond executed to several, a joint action may be maintained, although the attachment was levied on the separate property of each, in which they have not a joint interest. *Boyd v. Martin*, 10 Ala. 700. See *Alexander v. Jacobs*, 23 Ohio St. 359. No action will lie, however, on an attachment bond until the attachment shall have been discharged, and such final disposition of it must be alleged. *Nolle v. Thompson*, 3 Metc. (Ky.) 121; *Bittick v. Wilkins*, 7 Heisk. (Tenn.) 307. And it has been held that, in order to maintain an action on the bond, suit must first be brought to recover for the malicious act in suing out the attachment. *Holcomb v. Foxworth*, 34 Miss. 265; *Sledge v. Lee*, 19 Ga. 411; *Pinney v. Hershfield*, 1 Mon. T. 367. But the better opinion would seem to be that this is not requisite. *Churchhill v. Abraham*, 22 Ill. 455; *Bruce v. Coleman*, 1 Handy (Ohio), 515; *Smith v. Eakin*, 2 Sneed (Tenn.), 456; *Herndon v. Forney*, 4 Ala. 243; *Dickinson v. McGraw*, 4 Rand. (Va.) 158. Nor is it necessary, in order to enable the party injured to maintain a suit on the bond, that he should obtain an order of the court in which the bond was filed, to deliver it to him for suit. *Bruce v. Coleman*, 1 Handy (Ohio), 515; see *Adams v. Olive*, 48 Ala. 551.

The plaintiff, in an action on an attachment bond, is entitled to recover the actual damage he has sustained in consequence of the wrongful issuing of the attachment, by being deprived of his property, together with the actual costs and expenses incurred in defending the attachment proceedings. See *Donnell v. Jones*, 13 Ala. 490; *Johnson v. Farmers' Bank*, 4 Bush (Ky.), 283; *Munnerlyn v. Alexander*, 38 Tex. 125; *Hayden v. Sample*, 10 Mo. 215; *Dunning v. Humphrey*, 24 Wend. (N. Y.) 231. See *Wilson v. Root*, 43 Ind. 486. But remote or speculative damages, such as result from injuries to credit, business, character or feelings, cannot be recovered, if the attachment was procured in good faith. *Pettit v. Mercer*, 8 B. Monr. (Ky.) 51; *Campbell v. Chamberlain*, 10 Iowa, 337; *Floyd v. Hamilton*, 33 Ala. 235; *Slate v. Thomas*, 19 Mo. 613; *Myers v. Farrell*, 47 Miss. 281;

Plumb v. Woodmansee, 34 Iowa, 116. In the case last cited, it was held that the plaintiff could not recover for attorney fees paid by him for defending the attachment suit. And see *Moore v. Stanley*, 51 Mo. 317; *Hughes v. Brooks*, 36 Tex. 379.

§ 2. By action for malicious attachment. In the absence of malice, an action for the wrongful suing out of an attachment can be maintained only on the attachment bond. But if the defendant's property be attached maliciously, and without probable cause, the attachment plaintiff may be subjected to damages in an action governed by the principles of the common law applicable to actions for malicious prosecution. *Lovier v. Gilpin*, 6 Dana (Ky.), 321; *Smith v. Story*, 4 Humph. (Tenn.) 169; *Ivy v. Barnhart*, 10 Mo. 151; *McKellar v. Couch*, 34 Ala. 336; *Tallant v. Burlington Gas-light Co.*, 37 Iowa, 261; *Wood v. Weir*, 5 B. Monr. (Ky.) 544. The malice necessary to be shown in order to maintain the action is not necessarily revenge or other base and malignant passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and so known to the party, is in legal contemplation malicious. See *Wills v. Noyes*, 12 Pick. (Mass.) 324; *Kirksey v. Jones*, 7 Ala. 622; *Foster v. Sweeny*, 14 Serg. & R. (Penn.) 387; *Kirkham v. Coe*, 1 Jones' L. (N. C.) 423; *Burkhart v. Jennings*, 2 W. Va. 242. But the action cannot be maintained against an attachment plaintiff, on account of an attachment maliciously obtained without his knowledge, by an attorney at law employed by him to collect a debt (*Kirksey v. Jones*, 7 Ala. 622); though the attorney may be held liable, and in a case where he and his client act in concert they are both liable. *Wood v. Weir*, 5 B. Monr. (Ky.) 544. See *Marshall v. Betner*, 17 Ala. 832.

It constitutes no obstacle to the maintenance of the action, that the attachment was obtained in a court within a foreign jurisdiction. *Wiley v. Traiwick*, 14 Tex. 662. Nor does the consent of the defendant to a discontinuance of the attachment suit preclude him from claiming damages for a wrongful seizure. *Spalding v. Wallett*, 10 La. Ann. 105. And where property, exempted by law from attachment and execution, had been attached on *mesne process*, and the debtor declared to a third person "that he cared nothing about the property thus attached, that the creditor might have it and welcome, but he would take care that he got no more," it was held that neither this declaration nor evidence that the creditor, having heard of it, proceeded to act upon it, and caused the goods to be sold upon execution, could

avail to defeat the action. *Rice v. Chase*, 9 N. H. 178. An action for a malicious attachment cannot be brought, however, until the termination of the attachment suit; but an omission to aver its termination in the declaration is cured by verdict. *Feazle v. Simpson*, 2 Ill. (1 Scam.) 30; *Nolle v. Thompson*, 3 Metc. (Ky.) 121; *Rea v. Lewis*, Minor (Ala.), 382. See *Fortman v. Rottier*, 8 Ohio St. 548.

As it regards damages in an action for malicious attachment, the same rules apply as in other cases of malicious prosecution. The extraordinary costs, as between attorney and client, as well as all other expenses necessarily incurred in defense, are to be taken into the estimate of damages. See *Sandback v. Thomas*, 1 Stark. 306; *Tompson v. Mussey*, 3 Me. 305. So, it has been held that fees paid an attorney for defending the original suit may be recovered as part of the damages (*Hughes v. Brooks*, 36 Tex. 379; *Marshall v. Betner*, 17 Ala. 832); and for injuries to his credit and business the plaintiff is also entitled to recover damages. *State v. Thomas*, 19 Mo. 613; *Goldsmith v. Picard*, 27 Ala. 142. But see *O'Grady v. Julian*, 34 id. 88. See *ante*, 143, as to maliciously suing out an attachment and seizing goods.

CHAPTER XVIII.

ATTORNEYS.

TITLE I.

OF THE POWERS, RIGHTS, DUTIES AND LIABILITIES OF
ATTORNEYS IN GENERAL.

ARTICLE I.

NATURE OF THE OFFICE AND QUALIFICATIONS FOR.

Section 1. Nature of the office generally. The word "attorney," uncoupled with any qualifying expression, will be construed as meaning *attorney at law*. *Trowbridge v. Weir*, 6 La. Ann. 706; *Ingram v. Richardson*, 2 id. 839. And an attorney at law is defined to be one who is put in the place, stead, or *turn* of another, to manage his matters of law. 2 Broom & Had. Com. 19, Wait's ed.; 3 Bl. Com. 25. He is regarded as an officer of the court in which he is admitted to practice, and is held subject to the control of such court. *Merritt v. Lambert*, 10 Paige (N. Y.), 352; S. C., 2 Denio, 607; *Denton v. Noyes*, 2 Johns. (N. Y.) 296. So, attorneys, like other officers of the court, are, by a legal fiction, always deemed to be, during term, present in court. *People v. Nevins*, 1 Hill (N. Y.), 154. The office is one to be held during good behavior, and the attorney can only be deprived of it for misconduct ascertained and declared by the judgment of the court after an opportunity to be heard has been afforded. *Austin's Case*, 5 Rawle (Penn.), 191; *Fletcher v. Daingerfield*, 20 Cal. 430; *Ex parte Heyfron*, 7 How. (Miss.) 127.

It has been said that attorneys are to be considered as public officers. *Waters v. Whittemore*, 22 Barb. (N. Y.) 595. But, in South Carolina, it was held in an early case, that an attorney at law is not a public officer (*Byrne v. Stewart*, 3 Desau. [S. C.] 466); and it was decided in the Supreme Court of the United States that attorneys and counselors in the Federal courts are not officers of the United States. *Ex parte Garland*, 4 Wall.

(U. S.) 333, 378. And see *Ingersoll v. Howard*, 1 Heisk. (Tenn.) 247; *Leigh's Case*, 1 Munf. (Va.) 468; *Ex parte Faulkner*, 1 W. Va. 269; *Ex parte Law*, 35 Ga. 285; *Ex parte Yale*, 24 Cal. 241. Until recently, the two degrees of *attorney* and *counsel* were kept separate in the Supreme Court of the United States, and no person was permitted to practice both as attorney and counselor in that court. See *Hallowell's Case*, 3 Dall. 410. But the same person may now act as both (*Ex parte Garland*, 4 Wall. [U. S.] 333, 378); as he may in all the other courts of the United States, as well as in the courts of the several States. 1 Kent's Com. 308. Both titles are, however, still retained in common use.

The office of *attorney*, in the professional sense of the term, is not known in justices' courts. They are not courts of record, and have no such control over those who practice in them, as to render it safe to give to such persons any very liberal power, to conclude the rights of those whom they *claim* to represent. *Bailey v. Delaplaine*, 1 Sandf. (N. Y.) 11; and see *Hughes v. Mulvey*, id. 92.

§ 2. **Who may be admitted.** The question as to who may be admitted to the office of attorney is to be determined by the rules and regulations established on the subject in the several States. Every State in the Union has laws by which the right to practice in its courts may be granted, and that right is very generally made to depend upon the good moral character, the learning, and the professional skill of the party on whom the privilege is conferred. The right to admission in no sense depends on citizenship of the United States. *Bradwell v. State*, 16 Wall. (U. S.) 130. And the citizen of one State is not entitled, as matter of right, to admission to the bar of another State. *Matter of Henry*, 40 N. Y. (1 Hand) 560. So, where a woman was refused a license to practice law in the courts of a State, on the ground that females are not eligible under the laws of that State (*Re Bradwell*, 55 Ill. 535), it was held that such a decision violated no provision of the Federal Constitution. *Bradwell v. The State*, 16 Wall. (U. S.) 130.

Congress has power to prescribe the qualifications for the office of attorney and counselor in the Federal courts; but it is held that this power cannot be exercised as a means for the infliction of punishment for the past conduct of such officers, against the inhibition of the Constitution. *Ex parte Garland*,

4 Wall. (U. S.) 333, 380. See *Cummings v. State of Missouri*, id. 277.

§ 3. **Qualifications.** Attorneys are officers of the court, admitted as such by its order upon evidence of their possessing sufficient legal learning and fair private character. It is the general practice in this country to obtain this evidence by an examination of the parties making application for admission. And where the law provides for an examination of applicants for admission to the bar, before their admission, a candidate ought not to be admitted without attending in person at the time of the hearing, even when physically disabled at the time from coming. *Ex parte Snelling*, 44 Cal. 553. In regard to the inquiry as to the moral character of an applicant for admission, the court is not limited to the certificate, but will look behind it, and is bound to do so in cases attended with suspicious circumstances. *Attorneys' License*, 21 N. J. L. (1 Zab.) 345.

The constitution of the State of New York gives to every qualified applicant a title to admission, which is held to be a *substantial right*. And an act of the legislature of that State, making the diploma of a law school of the State conclusive evidence of the learning and ability of its possessor, was held to be constitutional and valid. *Matter of Cooper*, 22 N. Y. (8 Smith) 67.

An attorney at law is not bound, as a requisite of admission, in Virginia, to take the oath prescribed in the act against duelling, the practice of law not being an *office* or *place* under the Commonwealth. *Leigh's Case*, 1 Munf. 468; see *Seymour v. Ellison*, 2 Cow. (N. Y.) 13. *Matter of Wood*, 1 Hopk. (N. Y.) 6; *Matter of Dorsey*, 7 Port. (Ala.) 293. So, it has been held that the act of the legislature of Tennessee, requiring the courts to call before it "all the officers thereof," who shall swear that they are not guilty of any of the offenses contained in the Ku-Klux act, does not apply to attorneys. *Ingersoll v. Howard*, 1 Heisk. (Tenn.) 247. And one who has received a full pardon for all offenses committed by his participation, direct or implied, in the rebellion, is relieved from all penalties and disabilities attached to the offense of treason, committed by such participation. For that offense he is beyond the reach of punishment of any kind. He cannot, therefore, be excluded by reason of that offense, from continuing in the enjoyment of a previously acquired right to appear as an attorney and counselor in the United States courts. *Ex parte Garland*, 4 Wall. (U. S.) 333; see

Ex parte Tenney, 2 Duv. (Ky.) 351. In its application to such a person, the "attorneys' test oath," prescribed by act of congress of January 24, 1865, is held to be unconstitutional. *Id.*; *Ex parte Law*, 35 Ga. 285; and see *Ex parte Quarrier*, 2 W. Va. 569. The "attorneys' test oath act," of West Virginia, of February 14, 1866, was held to be not unconstitutional. *Ex parte Hunter*, 2 W. Va. 122. As to the effect of that act upon attorneys who had qualified as such before its passage, see *Ex parte Quarrier*, 4 *id.* 210.

A Virginia license to an attorney resident in the State at the time of the separation has the same effect in the State of West Virginia as if granted in that State. *Ex parte Faulkner*, 1 W. Va. 269; *Ex parte Quarrier*, 2 *id.* 569.

It is now settled that the admission of attorneys by the courts is not the exercise of a mere *ministerial* power. In the performance of the duty, the courts are to be considered as engaged in the exercise of their appropriate *judicial* functions. *Matter of Cooper*, 22 N. Y. (8 Smith) 67; *Strother v. Missouri*, 1 Mo. 605; *Ex parte Garland*, 4 Wall. (U. S.) 378; *Bradwell v. The State*, 16 *id.* 133; *Ex parte Secomb*, 19 How. (U. S.) 9; *Commonwealth v. Judges, etc.*, 1 Serg. & R. (Penn.) 187. The admission of an attorney is not, therefore, the subject of a writ of *mandamus*. *Id.* But the proceeding may be reviewed on writ of error or appeal, as the case may be. *Id.*

§ 4. **Suspension.** It is within the power of the court to suspend an attorney from practice for a limited time. *Ex parte Burr*, 2 Cranch (C. C.), 379; *Paul v. Purcell*, 1 Browne (Penn.), 348. And where an attorney commenced an action without being retained for that purpose, and failed in the suit, it was ordered that he should pay to the defendant his costs in ten days after notice of a rule upon him, or that he should be suspended from all practice as an attorney until the costs should be paid. *Anonymous*, 2 Cow. (N. Y.) 589. Where a statute made provision for the suspension of an attorney, guilty of certain specified wrongful acts, it was held that this provision did not restrict the general power of courts over their officers, and that they could suspend an attorney for other causes than those mentioned in the statute. *Matter of Mills*, 1 Mich. 392. In New Hampshire an attorney may be suspended from practice in the common pleas by that court, on good cause shown; but ignorance of the law is held not good cause. *Bryant's Case*, 24 N. H. (4 Fost.) 149.

An attorney's license cannot be summarily suspended by the court, but only upon an accusation, notice, and a day in court. *State v. Start*, 7 Iowa, 499; see *Withers v. State*, 36 Ala. 252; *Fisher's Case*, 6 Leigh (Va.), 619. And the precise cause of suspension must appear in the order of suspension. *State v. Watkins*, 3 Mo. 388. An attorney, in contempt of the process of the law, by neglecting to appear before an examiner to testify, cannot be punished by suspending him from his professional functions. *Commonwealth v. Newton*, 1 Grant's Cas. Penn.) 453.

§ 5. **Striking off the roll.** An attorney and counselor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency. See *Ex parte Garland*, 4 Wall. (U. S.) 333. The specific cases in which the court will be justified in striking the name of an attorney from the roll will be enumerated in a subsequent section. See *post*, , art. 10.

ARTICLE II.

AUTHORITY OR POWERS OF ATTORNEYS.

Section 1. In general. An attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action. *Wieland v. White*, 109 Mass. 392; *Moulton v. Bowker*, 115 id. 36; S. C., 15 Am. Rep. 72; *Rice v. Wilkins*, 21 Me. 558.

And it may be stated as a general rule, that in the absence of fraud, his acts are binding upon the client. *Lawson v. Bettison*, 12 Ark. 401; *Chambers v. Hodges*, 23 Tex. 104; *Sampson v. Ohleyer*, 22 Cal. 200. And, unless an attorney be so situated as to excite the suspicion of the court, his authority will not be questioned. *Taliaferro v. Porter*, Wright (Ohio), 611; *Smith v. Stewart*, 6 Johns. (N. Y.) 34; *Bogardus v. Livingston*, 2 Hilt. (N. Y.) 236. When one puts his case against another into the hands of an attorney for suit, it is a reasonable presumption

that the authority he intends to confer upon the attorney includes such action as the latter, in his superior knowledge of the law, may decide to be legal, proper and necessary in the prosecution of the demand (*ante*, 221); and, consequently, whatever adverse proceedings may be taken by the attorney are to be considered, so far as they affect the defendant in the suit, as approved by the client in advance, and, therefore, as his act, even though they prove to be unwarranted by the law. *Foster v.*

Wiley, 27 Mich. 244; S. C., 15 Am. Rep. 185. So, the acts and proceedings of an attorney in a suit may become binding upon a client by a ratification thereof. See *Narraguagus v. Wentworth*, 36 Me. 339; *Mason v. Stewart*, 6 La. Ann. 709; *Williams v. Reed*, 3 Mas. (C. C.) 405; *Ryan v. Doyle*, 31 Iowa, 53.

§ 2. To demand clients' money, etc. An attorney may, by virtue of his retainer, receive his client's money in any case in which he is employed; and the act will be binding upon his client, unless the party paying it had notice of a revocation of the attorney's authority to act in the case. *Hiller v. Ioy*, 37 Miss. 431; *Ruckman v. Allwood*, 44 Ill. 183; *Ducett v. Cunningham*, 39 Me. 386; *Megary v. Funtis*, 5 Sandf. (N. Y.) 376. But an attorney is not authorized to receive any other thing than lawful money in payment of his client's claim; without express authority from his client or principal. *Bailey v. Bagley*, 19 La. Ann. 172; *Wright v. Daily*, 26 Tex. 730; *Jeter v. Haviland*, 24 Ga. 252; *Harper v. Harvey*, 4 W. Va. 539; *Stackhouse v. O'Hara*, 14 Penn. St. 88; *Ely v. Harvey*, 6 Bush (Ky.), 620; *Moye v. Cogdell*, 69 N. C. 93. He may, however, receive partial payments on any claim put in his hands for collection. *Pickett v. Bates*, 3 La. Ann. 627. And it has been held that, under his general authority to collect, he may accept payment partly in cash, and partly in a note, at a short date, of a person of undoubted responsibility. *Livingston v. Radcliff*, 6 Barb. (N. Y.) 201. So, it was held in a Virginia case, that an attorney who accepted Confederate treasury notes in payment of a claim placed in his hands for collection, at a time when such notes constituted the only currency in use, and were but slightly depreciated, was not responsible to his client for the ultimate loss on such notes, when the latter did not instruct him not to accept payment in such currency. *Pidgeon v. Williams*, 21 Gratt. (Va.) 251.

An attorney, though authorized, is not bound to receive money collected for his client on execution. *Poole v. Gist*, 4 McCord

(S.C.), 259. And where the client receives the execution into his own hands, and pays the attorney his costs, the power of the attorney ceases, and he will no longer be authorized to receive the money due on the execution. *Parker v. Downing*, 13 Mass. 465.

An attorney cannot bind his client by an agreement to set off his own debt in part payment of a debt due the client (*Child v. Dwight*, 1 Dev. & B. Eq. [N. C.] 171); nor has he a right to enter into an agreement, by which land is to be taken instead of money, in satisfaction of his client's claim. *Huston v. Mitchell*, 14 Serg. & R. (Penn.) 307. But he has authority to receive *seizin* for the creditor, on a levy of an execution on the debtor's land. *Pratt v. Putnam*, 13 Mass. 363.

§ 3. To dispose of securities, etc. An attorney at law, who has been employed to collect a claim, has no power to sell or otherwise dispose of the claim, without express authority from his client. Thus, he cannot transfer a note in his hands for collection (*Child v. Eureka, etc., Works*, 44 N. H. 354; *Russell v. Drummond*, 6 Ind. 216; *Craig v. Ely*, 5 Stew. & P. [Ala.] 354); nor can he sell or assign a judgment of his client without express authority. *Fassitt v. Middleton*, 47 Penn. St. 214; *Rowland v. State*, 58 id. 196; *Maxwell v. Owen*, 7 Coldw. (Tenn.) 630. So, an attorney into whose hands a demand is put for collection, has no authority to surrender such demand, upon the undertaking of another person; and, especially, if the security was not thereby strengthened. *Tankersly v. Anderson*, 4 Desau. (S. C.) 44.

§ 4. To make settlements, compromises, etc. It is a general rule that an attorney cannot, by virtue of his general authority to conduct a suit, bind his client by bargains or contracts to compromise the cause of action. Such bargain or contract is void, unless specially authorized or ratified by the client. *Spears v. Ledergerber*, 56 Mo. 465; *Walden v. Bolton*, 55 id. 405; *Maddux v. Bevan*, 39 Md. 485; *Adams v. Roller*, 35 Tex. 711; *Moye v. Cogdell*, 69 N. C. 93; *Marbourg v. Smith*, 11 Kans. 554; *Mandeville v. Reynolds*, 5 Hun (N. Y.), 338. It would seem, however, that if the compromise be not so unreasonable as to warrant a belief that the attorney was imposed on, or that he did not exercise his judgment fairly, the court will not be inclined to disturb it. *Holker v. Parker*, 7 Cranch, 436; *Potter v. Parsons*, 14 Iowa, 286. And a compromise acquiesced in for years by the principal will bind him forever. *Mayer v. Foulkrod*, 4 Wash. (C. C.) 511. So it was held that an attorney who is a director in

a railroad company, and is openly employed to prosecute a suit against the road, may compromise the suit, and recover his fees for legal services in the case. *Christie v. Sawyer*, 44 N. H. 298.

An attorney has authority to submit the cause to arbitration (*Abbe v. Rood*, 6 McLean, 106; *Markley v. Amos*, 8 Rich. [S. C.] 468; *Jenkins v. Gillespie*, 18 Miss. 31); but he has no power to change the terms of submission entered into by the parties themselves, especially where it does not appear that he was employed until after the submission, nor to what extent his authority went. *Id.* Agreements relating to the conduct of a suit and its proceedings during the trial, made by attorneys in the case in open court, and entered upon the record, are held to be binding upon the parties. *McCann v. McLennan*, 3 Neb. 25. So, an agreement of attorneys, in the court below, to abide by the opinion of a professional gentleman, whether restitution of the premises should be made to the plaintiff in error, from whom they had been taken by a *habere facias*, was enforced by the supreme court. *Cahill v. Benn*, 6 Binn. (Penn.) 99. But an agreement between counsel without authority from their client, that the dismissal of an action shall be a bar to an action for malicious prosecution, is void and ineffectual to bind the client. *Marbourg v. Smith*, 11 Kans. 554.

Where the plaintiffs in a suit instructed their attorney to settle on certain terms, coupled with a certain condition, and afterward spoke to the defendants of the terms of settlement, without saying any thing about the condition, and the attorney never mentioned the condition, but settled upon the other terms proposed, and the defendants believed that the attorney had authority to settle as he did, it was held that the plaintiffs were bound by the settlement. *Peru Steel, etc., Co. v. Whipple File, etc., Co.*, 109 Mass. 464.

The employment of an attorney at law to prosecute a suit for land of which the party alleges that he has been disseized, carries with such employment an authority to such attorney to compromise the claim against the disseizor for *mesne profits* during the pendency of the suit, if he deem such action best for the interest of his client. *Bonny v. Morrill*, 57 Me. 368.

§ 5. To control proceedings, etc., of suits. The right of an attorney of record to manage and control an action cannot be questioned while he remains such, and no stipulation by his client as to the conduct or disposal of the action should be entertained by the court, unless it is signed or assented to by him.

Commissioners v. Younger, 29 Cal. 147. Thus, the court will deny a motion to dismiss the action, founded on a written consent of the plaintiff personally, if the attorney for the plaintiff refuses his consent. *McConnell v. Brown*, 40 Ind. 384. So, a stipulation signed by the party in person, granting time to file a statement, will be disregarded. *Mott v. Foster*, 45 Cal. 72. The attorney has the exclusive management and control of the case, and his temporary absence from the county does not affect the rule. *Ib.* And it is held that an attorney employed in anticipation of a suit has as much power to bind his client before as after the suit has been commenced, and may bind him by waiver of service. *Hefferman v. Burt*, 7 Iowa, 320; 1 Wait's Pr. 241, 242.

An attorney may, by virtue of his general authority, release from attachment the property of the debtor attached in the suit. *Monson v. Hawley*, 30 Conn. 51. And he may, in cases of special attachment, do all acts which the interests of his clients may require. *Pierce v. Strikland*, 2 Story, 292. He likewise has power to use all reasonable and usual means to secure his client's claim, where the latter resides in another State. He may indemnify an officer for making a levy directed by him in good faith and upon reasonable grounds, and, if he indemnified the officer by his own bond, he may recover from his client what he is obliged to pay thereon. *Clark v. Randall*, 9 Wis. 135. So he may, under his general authority, waive a verification (*Smith v. Mullikin*, 2 Minn. 319); verify, by affidavit, a petition in *scire facias* (*Wright v. Parks*, 10 Iowa, 342. See 1 Wait's Pr. 241, 242); permit a sheriff to renew an execution in the name of the client (*Cheever v. Merrick*, 2 N. H. 376); consent to an order of court referring the matters in dispute to accountants, to report thereon to the court, and such consent and his consent to a confirmation of the report, will bind his client. *Stokely v. Robinson*, 34 Penn. St. 315; *Woder v. Powell*, 31 Ga. 1; *Smith v. Bassard*, 2 McCord's Ch. (S. C.) 406. He may also have briefs printed at the expense of his client (*Weisse v. New Orleans*, 10 La. Ann. 46); and he may place his client's name on the writ as indorser. *Minor v. Smith*, 6 N. H. 219; but see *Alsbaugh v. Jones*, 64 N. C. 29; *Chadwick v. Upton*, 3 Pick. (Mass.) 443; *Harmon v. Watson*, 8 Me. 287. And if the attorney of a non-resident has in his possession the note sued on, he may swear to the complaint on behalf of his client. *Bates v. Pike*, 9 Wis. 224. So, an attorney retained to make a motion to change the

place of trial, has authority to consent to a reference of the action. *Tiffany v. Lord*, 40 How. (N. Y.) 481.

But an attorney cannot, under his general authority, consent to the entry of a judgment against his client, without his assent (*People v. Lamborn*, 2 Ill. [1 Scam.] 123; see *Dobbins v. Dupree*, 39 Ga. 394; *Lyon v. Williams*, 42 id. 168); nor can he assign a judgment (*Head v. Gervais*, Walk. [Mich.] 431; *Rowland v. State*, 58 Penn. St. 196); nor enter a *retraxit* (*Lambert v. Sanford*, 2 Blackf. [Ind.] 137); nor release a garnishee from his attachment (*Quarles v. Porter*, 12 Mo. 76); nor release the liability of a witness to pay a part of the costs (*Bowne v. Hyde*, 6 Barb. [N. Y.] 392; *Springer v. Whipple*, 17 Me. 351; *Murray v. House*, 11 Johns. [N. Y.] 464); nor release an indorser of a note, in order to render him competent to testify in an action against the maker (*York Bank v. Appleton*, 17 Me. 55; *East Riv. Bank v. Kennedy*, 9 Bosw. [N. Y.] 573); nor can he prosecute or defend a suit, to release a claim of his client on a third person, for the purpose of making such person a competent witness for his client (*Shores v. Caswell*, 13 Metc. [Mass.] 413); or admit service for his client of an original process, by which the court obtains jurisdiction for the first time of his person. To authorize such admission, special authority must appear. *Masterson v. Le Claire*, 4 Minn. 163; and see *Hunt v. Brennan*, 1 Hun (N. Y.), 213.

An attorney of record, in an action in which an erroneous judgment is rendered against his client, has authority, and it is his duty to sue out a writ of error to reverse it, without special instructions. *Grosvenor v. Danforth*, 16 Mass. 74. So, an attorney of record has authority to discontinue the suit. *Gaillard v. Smart*, 6 Cow. (N. Y.) 385; *Barrett v. Third Avenue R. R. Co.*, 45 N. Y. (6 Hand) 628, 635. And it is held that an affidavit to obtain an order of seizure and sale, made by the attorney, in the absence of his principal, is sufficient. *Simpson v. Lombas*, 14 La. Ann. 103. So, the authority of an attorney to make affidavit to hold to bail is sufficiently shown by the fact that suit was brought by him in the name of the plaintiffs, founded on such bail proceeding. *Murphy v. Winter*, 18 Ga. 690.

Where the solicitor of a party, at whose suit land has been attached and its sale enjoined, consents to a sale thereof, the party purchasing acquires a valid title. *Rice v. O'Keefe*, 6 Heisk. (Tenn.) 638.

§ 6. To make admissions, stipulations, etc. The admissions of attorneys of record bind their clients in all matters relating to the progress and trial of causes in which they are retained, and are generally conclusive. *Rogers v. Greenwood*, 14 Minn. 333; *Smith v. Dixon*, 3 Metc. (Ky.) 438. Thus, an attorney may bind his client by the admission of a fact for the purposes of a trial (*Starke v. Kenan*, 11 Ala. 819; *Farmers' Bank v. Sprigg*, 11 Md. 389); by a stipulation substantially settling the issues to be tried (*Bingham v. Supervisors*, 6 Minn. 136); by making proper agreements in regard to the suit (*Farmers' Trust, etc., Bank v. Ketchum*, 4 McLean, 120); by consenting to an order of the court (*Hart v. Spaulding*, 1 Cal. 213); or by a waiver of all informalities and irregularities. *Hanson v. Hoitt*, 14 N. H. 56. And see *Talbot v. McGee*, 4 T. B. Monr. (Ky.) 377; *Pike v. Emerson*, 5 N. H. 293. But a waiver of trial by jury in criminal cases, and an agreement for trial by the court is not binding on the defendant if it be made by his attorney without consulting him, although he was present in court. *Brown v. State*, 16 Ind. 496. So, although an attorney has all the authority necessary under his general retainer for the conduct and management of the action and for the collection of the debt, if any, his powers to act go no further, even if he thinks it for the benefit of his client. See, also, 1 Wait's Pr. 241, 242. He cannot, therefore, stipulate not to appeal or seek a new trial. *People v. Mayor, etc., of N. Y.*, 11 Abb. Pr. (N. Y.) 66. And agreements of counsel and attorneys in the progress of cases will not be enforced when they are not mutual, or where a substantial right of a party has been waived by his counsel without his consent. *Howe v. Lawrence*, 22 N. J. L. (2 Zab.) 99. But to obtain relief against a stipulation on the mere ground of oversight or mistake of the attorney, it must have been one which ordinary care and attention would not have guarded against. *Rogers v. Greenwood*, 14 Minn. 333. See *Read v. French*, 28 N. Y. (1 Tiff.) 285. The rule that stipulations made in open court by the attorney of a party, in respect to a cause therein pending, are, when authorized and free from fraud, valid and binding (see *McCann v. McLennan*, 3 Neb. 25); applies to stipulations entered into by the attorney of a county, on behalf of the county. *Lockwood v. Blackhawk County*, 34 Iowa, 235. And such a stipulation cannot be repudiated by the successors in employment of the attorney who made the agreement while acting in behalf of the county. *Ib.*

§ 7. To control judgment, execution, etc. The right of the defendant's attorney to confess judgment for his client is said to be a legitimate incident of his professional relation to the cause. Such confession, therefore, when made with the knowledge and at the instance of the client, is sufficient in law without any special authorization. *Lyon v. Williams*, 42 Ga. 168; *Dobbins v. Dupree*, 39 id. 394; and see *Denton v. Noyes*, 6 Johns. (N. Y.) 296. After the rendition of a final judgment, the attorneys by whom the suit was presented and defended have no authority, resulting from their original employment, to consent to set it aside, or agree to a new trial. But a special power for that purpose may be conferred upon them, and any consent or agreement, given or made by an attorney duly authorized, in such case, will be effectually binding upon his client. *Holbert v. Montgomery*, 5 Dana (Ky.), 11; see *Clussman v. Merkel*, 3 Bosw. (N. Y.) 402. And the attorney of a judgment debtor is held to have *implied authority* to take out execution on a judgment recovered by him for his client, and to procure a satisfaction thereof by a levy on lands, or otherwise, and to receive the money due on the execution. *Union Bank v. Geary*, 5 Pet. (U. S.) 98; *Erwin v. Blake*, 8 id. 18; see *Hyams v. Michel*, 3 Rich. (S. C.) 303. So, he may direct the sheriff as to the time and manner of enforcing the execution (id.; *Willard v. Goodrich*, 31 Vt. 597; *Gorham v. Gale*, 7 Cow. [N. Y.] 739); and he may stay execution upon a judgment, in consideration of the promise of a third person to pay the debt; and such promise is binding, although not made to the creditor, nor expressly assented to by him at the time. *Silvis v. Ely*, 3 Watts & S. (Penn.) 420. He may likewise discharge a defendant from arrest, on a *ca. sa.* issued by him; and the officer is bound to receive and obey his instructions. *Hopkins v. Willard*, 14 Vt. 474; *Scott v. Seiler*, 5 Watts (Penn.), 235.

The acknowledgment of satisfaction, or a discharge of a judgment by an attorney, binds his client. *Wyckoff v. Bergen*, 1 N. J. L. (Coxe) 214. And the power of an attorney extends to opening a default which he has taken (whether properly or improperly), and vacating the judgment entirely, even though his client has instructed him to the contrary. *Read v. French*, 28 N. Y. (1 Tiff.) 285. But see *Quinn v. Lloyd*, 36 How. (N. Y.) 378; S. C., 5 Abb. (N. S.) 281; 7 Rob. 538, in which it is held that an attorney has no authority, without the knowledge and consent of his client, to consent to vacate a judgment which is

pending and secured on appeal. See *Howe v. Lawrence*, 2 Zab. (N. J.) 29. So, an attorney has no authority to execute a satisfaction of judgment on behalf of his client without payment (*Carstens v. Barnstorf*, 11 Abb. [N. Y.] N. S. 442; *De Mets v. Dagron*, 53 N. Y. 635); or by accepting less than the full amount of the judgment. *Nolan v. Jackson*, 16 Ill. 272; *Vail v. Jackson*, 15 Vt. 314; *Wilson v. Wadleigh*, 36 Me. 496. And even where the attorney holds the judgment by assignment, as security for debts due from the client, his satisfaction without payment is good only for the amount of his interest. *Beers v. Hendrickson*, 45 N. Y. (6 Hand) 665.

An attorney who is counsel upon record for the plaintiff upon a judgment, cannot release from the lien of the judgment, the real estate of the defendant, either wholly or in part, without the consent of his client. *Dollar Savings Bank v. Robb*, 4 Brewst. (Penn.) 106; *Harrow v. Farrow*, 7 B. Monr. (Ky.) 126. Nor has he any implied authority to release property levied on under execution (*Banks v. Evans*, 18 Miss. [10 S. & M.] 333); or to discharge the defendant from execution on a *ca. sa.* without satisfaction (*Kellogg v. Gilbert*, 10 Johns. 220; *Simonton v. Barrell*, 21 Wend. 362); or to stay an execution as to a principal debtor, so as to discharge a surety (*Union Bank v. Govan*, 18 Miss. 333); or to release the sureties of his client's debtor (*Givens v. Briscoe*, 3 J. J. Marsh. [Ky.] 532); or to purchase real estate under his client's execution. *Washington v. Johnson*, 7 Humph. (Tenn.) 468. But where goods, taken on execution and in the hands of the sheriff, are of a perishable nature and liable to be stolen, the attorney of the attaching creditor has authority to bind his client by consenting to a sale of them, "on the terms that the money should not be paid over to either party, but retained by the sheriff and paid into court, to abide the order of the court" (*Nelson v. Cook*, 19 Ill. 440); and it makes no difference in such a case, to whom the property really belongs. *Id.*

Whether one who has been accustomed to take judgments for a party is authorized to act as his attorney in a given case — as in indorsing a writ and directing the sheriff's levy — is held to be a question of fact for the jury. *Alsbaugh v. Jones*, 64 N. C. 29.

An attorney who has obtained judgment for his client continues to be his agent in the collection of the money (*M' Donald v. Todd*, 1 Grant's Cas. [Penn.] 17); and payment to an attorney is payment to his client. *Ely v. Harvey*, 9 Bush (Ky.), 620.

§ 8. To prosecute auxiliary proceedings. An attorney is only authorized to appear and act for the party in the proceedings which constitute a part of the action. He has no more authority to appear for the party in other proceedings, not forming essentially a part of the action, particularly when they partake of a criminal character and involve his liberty, than he would have authority to appear to answer or plead guilty to an indictment against his client. *Pitt v. Davison*, 37 Barb. 97. See S. C., 37 N. Y. (10 Tiff.) 235. But it is held that an attorney who prosecutes a suit and obtains a judgment, may, without any other authority than his retainer in the suit, demand from the debtor an assignment of his choses in action, and on refusal institute proceedings under the New York non-imprisonment act. *Steward v. Biddlecum*, 2 N. Y. (2 Comst.) 103; *ante*, 221. So, an attorney who receives a note for collection is authorized, by his general retainer, to bring a second suit on the note, after being nonsuited in the first for want of due proof of the execution of the note. *Scott v. Elmendorf*, 12 Johns. 315. And the attorney of the plaintiff has power, under his general authority, to give directions as to the time and manner of enforcing the execution. *Gorham v. Gale*, 7 Cow. 739. And see *Erwin v. Blake*, 8 Pet. (U. S.) 18. The *scire facias* in foreign attachment, though technically a new action, is not strictly such, but is a further proceeding in consummation of that commenced by the original process; and it seems to have been to a considerable extent, especially formerly, the understanding of the profession, that counsel retained in the original proceedings were also retained to appear in the *scire facias*. *Day v. Welles*, 31 Conn. 344. But counsel who undertake to defend a client upon a criminal accusation do not thereby agree to defend his bailors upon a *scire facias* on the recognizance. *Headley v. Good*, 24 Tex. 232.

An attorney, employed to defend a suit removed from a justice's court to the common pleas by *certiorari*, has no authority, by virtue of his retainer for that purpose, to bring a suit in the name of his client, against the obligors in the bond given upon obtaining the *certiorari*. *Walradt v. Maynard*, 3 Barb. 584. See *Adams v. Fort Plain Bank*, 36 N. Y. (9 Tiff.) 255, 264.

§ 9. Termination of authority. The authority of an attorney who is employed to prosecute or defend a suit, in the absence of special circumstances, continues, by virtue of his original retainer, until it is finally determined. The client may terminate the authority at his pleasure, or the attorney may do so after

reasonable notice; but in the absence of proof to the contrary, the presumption is that it continues until the litigation has ended. *Love v. Hall*, 3 Yerg. (Tenn.) 408; *Langdon v. Castleton*, 30 Vt. 285; *Lush v. Hastings*, 1 Hill (N. Y.), 656; *Mygatt v. Wilcox*, 45 N. Y. (6 Hand) 306; S. C., 6 Am. Rep. 90; *Bathgate v. Haskin*, 59 N. Y. (14 Sick.) 533. The authority of an attorney may be determined by the death of his client (1 Wait's Pr. 242); and he cannot give nor receive notice of motions in the cause, until the successor, made a party in due form, has authorized him to act thereon. *Austin v. Monroe*, 4 Lans. (N. Y.) 67; *Putnam v. Van Buren*, 7 How. (N. Y.) 31; *Judson v. Love*, 35 Cal. 463; *Gleason v. Dodd*, 4 Metc. (Mass.) 333; *Risley v. Fellows*, 10 Ill. (5 Gilm.) 531; *Campbell v. Kincaid*, 3 T. B. Monr. (Ky.) 566. See *Succession of Liles*, 24 La. Ann. 490; *Wilson v. Smith*, 22 Gratt. (Va.) 493.

That the general authority of an attorney ceases with the entry of judgment for his client, see *Hinkley v. St. Anthony Falls, etc., Co.*, 9 Minn. 55; *Richardson v. Talbot*, 2 Bibb (Ky.), 382; *Jackson v. Barlett*, 8 Johns. 361. And it is held that an attorney, who tried a cause below, is not authorized to appear in the appellate court without a new retainer. *Covill v. Phy*, 24 Ill. 57, and see *Walradt v. Maynard*, 3 Barb. 584. But it has been held in a number of cases that the general power of an attorney continues until the judgment is satisfied, unless previously terminated by some act of the client. See *Flanders v. Sherman*, 18 Wis. 575; *Nichols v. Dennis*, R. M. Charlt. (Ga.) 188; *Gray v. Wass*, 1 Me. 257; and see *Miller v. Miller*, 37 How. (N. Y.) 1; *ante*, 441, § 7.

ARTICLE III.

DUTIES, LIABILITIES AND DISABILITIES OF ATTORNEYS.

Section 1. In general. The relation existing between attorney and counsel and client is one of trust and confidence, placing the interests and rights of the client very much under the guardianship and control of the counsel, and is liable to abuses resulting in serious and lasting injury to the client. The law regards the client as very much under the influence and control of the attorney and counsel, while the ordinary professional relation exists between them, and for that reason the conduct and acts of the latter are closely watched and scrutinized. See *Goodenough*

v. *Spencer*, 2 N. Y. S. C. (T. & C.) 508; S. C., 46 How. 347; *Hatch v. Fogarty*, 33 N. Y. Supr. Ct. 166. There is, however, no implied agreement in the relation of attorney and client, or in the employment of the former by the latter, that the former will guarantee the success of his proceedings in a suit, or the soundness of his opinions, or that they will be ultimately sustained by a court of last resort. *Bowman v. Tallman*, 27 How. (N. Y.) 212; S. C. affirmed, 40 id. 1. It is only required of him that he act honestly and to the best of his ability. *Lynch v. Commonwealth*, 16 Serg. & R. (Penn.) 368.

§ 2. **Skill and fidelity.** When a person adopts the profession of the law, and assumes to exercise its duties in behalf of another, for hire and reward, he must be held to employ in his undertaking a reasonable degree of care and skill. 1 Wait's Pr. 242, 243. And if injury results to the client, from the want of such a degree of reasonable care and skill, the attorney must respond in damages, to the extent of the injury sustained. See *Pidgeon v. Williams*, 21 Gratt. (Va.) 251; *Harter v. Morris*, 18 Ohio St. 492; *Watson v. Muirhead*, 57 Penn. St. 161; *Walpole v. Carlisle*, 32 Ind. 415. But it must not be understood that an attorney is liable for every mistake that may occur in practice, and held responsible for the damages that may result. If he acts with a proper degree of attention, with reasonable care, and to the best of his skill and knowledge, he will not be held responsible. *Stevens v. Walker*, 55 Ill. 151; *Gambert v. Hart*, 44 Cal. 542; *Bowman v. Tallman*, 40 How. (N. Y.) 1; 1 Wait's Pr. 242, 243. He must, of course, have sufficient learning to be able to determine, with reasonable accuracy, upon the appropriate remedies for enforcing or securing the rights of his client; and the degree of skill required must be sufficient to enable him to conduct the proceedings appropriate to such remedies. If he fails in any of these respects, he may, and sometimes does, not only forfeit all claims for compensation, but also renders himself liable to his client for any damage which he may thereby sustain. *Id.*; *Hatch v. Fogarty*, 33 N. Y. Supr. Ct. 166; see *Ex parte Gibberson*, 4 Cranch (C. C.), 503; *Weimer v. Sloane*, 6 McLean, 259. It has been held, however, that the skill required has reference to the character of the business which the attorney undertakes to do. *Wilson v. Russ*, 19 Me. 421; *Cox v. Sullivan*, 7 Ga. 144; *O' Barr v. Alexander*, 37 id. 195.

§ 3. **Attorney as bail.** Attorneys were not disqualified to be bail by the common law. But it is a general rule of the court

of King's bench, adopted at an early period, that no attorney of that, or any other court, shall be bail, in any action depending in that court. 1 Tidd's Pr. 230. The same rule prevails, also, in the court of common bench (*Cakish v. Ross*, 1 Taunt. 164); and it has been adopted, generally, in the United States. See *Mills v. Clarke*, 4 Bosw. (N. Y.) 632; *Coster v. Watson*, 15 Johns. 535; *Love v. Sheffelin*, 7 Fla. 40; *Massie v. Mann*, 17 Iowa, 131; *Gilbank v. Stevenson*, 30 Wis. 155. The rule is said to be founded upon reasons of convenience, and to relieve attorneys from importunities of their clients, and clients of exorbitant exactions of their attorney. And it has been held that bail by an attorney cannot be treated as a nullity, but is ground of objection only. *Banter v. Levy*, 1 Chit. 713; *King v. Sheriff of Surrey*, 2 East, 181. And that an attorney is liable on his recognizance when it is entered into, notwithstanding he is prohibited from becoming bail. *Harper v. Tahomden*, 1 Chit. 714, note.

In New York the rule as to bail in courts of law was not formerly adopted in the court of chancery, in respect to security required by statute, and it was held that the solicitor might be surety upon a bond for costs. *Mickelthwaite v. Rhodes*, 4 Sandf. Ch. (N. Y.) 434. And in a recent case in that State, it was held that the disability of attorneys was limited to bail for the appearance of the party arrested. *Ryckman v. Coleman*, 13 Abb. Pr. 398. So, under the statute regulating security for costs, the attorney for a non-resident plaintiff might have become surety for his client. *Walker v. Holmes*, 22 Wend. 614. Where an attorney, not of record in the action, but only an attorney at law, signed a bond as security for costs for a non-resident plaintiff, it could not be enforced against him by the court in a summary manner. The obligation could be enforced in no other manner than if it was the obligation of a person not an attorney or officer of the court. *Willmont v. Meserole*, 48 How. (N. Y.) 430; 16 Abb. (N. S.) 308. The New York Rules of Court, No. 8, provides: "In no case shall an attorney be surety on any undertaking, or bond required by law in any action or proceeding, or be bail in any civil or criminal case or proceeding." In Indiana it has been held that an attorney may be surety for his client. *Abbott v. Zeigler*, 9 Ind. 511.

§ 4. *Attorney as witness.* It is sometimes indispensable that an attorney, to prevent injustice, should give evidence for his client. It has, therefore, been held in numerous cases, that the

attorney in a cause is not, because such, disqualified from being a witness (*Cobbett v. Hudson*, 22 L. J. Q. B. 11; S. C., 1 Ell. & B. 11; *Chartiers and Robinson Turnpike Co. v. McNamara*, 72 Penn. St. 278; S. C., 13 Am. Rep. 673; *Reed v. Colcock*, 1 Nott & McCord [S. C.], 592; *Hall v. Renfro*, 3 Metc. [Ky.] 51; *Robinson v. Dauchy*, 3 Barb. [N. Y.] 20; *Potter v. Ware*, 1 Cush. [Mass.] 519); even though his judgment fee depends on his success (*Newman v. Bradley*, 1 Dall. [Penn.] 241), and though he expects a larger fee if his client succeeds. *Boulder v. Hebel*, 17 Serg. & R. (Penn.) 32; *Miles v. O'Hara*, 1 id. 32; *M'Gehee v. Hansell*, 13 Ala. 17; *Slocum v. Newby*, 1 Murph. (N. C.) 423. But the practice of an attorney testifying, or making affidavit for his client, is considered objectionable (see *Spencer v. Kinard*, 12 Tex. 180; *Stratton v. Henderson*, 26 Ill. 68), and should be discountenanced, as far as possible, by the courts and counsel. *State v. Woodside*, 9 Ired. (N. C.) 496; *Frear v. Drinker*, 8 Penn. St. 520.

In *Little v. McKeon*, 1 Sandf. 607, the court said: "As to the effect of this practice upon the character of the bar, we think the evil will work its own cure. Attorneys, as well as counselors, of standing and character will never, except in extreme cases, present themselves before a jury as witnesses in their own causes on litigated questions, and in such cases only of some unforeseen necessity. Those gentlemen of the bar who habitually suffer themselves to be used as witnesses for their clients, soon become marked both by their associates and the courts, and forfeit in character more than will ever be compensated to them by success in such clients' controversies."

§ 5. **Attorney cannot act in other capacity.** It is held that a solicitor in a case cannot act as a special master to execute the decree. *White v. Hoffaker*, 27 Ill. 349. And, as a general rule, a receiver in an action cannot appoint, as his attorney, the attorney of either party. *Branch v. Harrington*, 49 How. (N. Y.) 196; *Warren v. Sprague*, 4 Edw. Ch. (N. Y.) 416. So, a person deputed by a justice of the peace to serve a summons issued by such justice, is to be deemed a constable *quoad* the action, and is prohibited from appearing as attorney for the plaintiff, upon the trial. *Knight v. Odell*, 18 How. (N. Y.) 279; *Wilkinson v. Vorce*, 41 Barb. (N. Y.) 370. See *Eldredge v. McNulty*, 45 How. 440; *Ingraham v. Leland*, 19 Vt. 304. And a person who is administrator of an estate cannot act as an attorney in the prosecution of claims against the same estate. *Spinks v.*

Davis, 32 Miss. 152. But one who has acted as attorney at law of a party in obtaining a judgment, may act as commissioner in taking a deposition for his client, to be used in a claim suit growing out of the judgment; provided he is not the attorney in the claim suit, and does not appear to have any interest in the event of the suit. *Taylor v. Branch Bank*, 14 Ala. 633.

§ 6. **Cannot act on opposite sides.** An attorney owes to his client fidelity, secrecy, diligence and skill; and he cannot, therefore, serve professionally, both parties to a controversy, nor take a reward from the other side. 1 Wait's Pr. 243; *Yardly v. Ellill*, Hob. 8 a; *King v. Shore*, Cro. Eliz. 914; *Herrick v. Catley*, 1 Daly (N. Y.), 512; S. C., 30 How. 208; *Sherwood v. Saratoga, etc., R. R. Co.*, 15 Barb. (N. Y.) 650; see *ante*, 245 to 249. So, an attorney is never allowed to change sides in the same cause, though at different trials. *Valentine v. Stewart*, 15 Cal. 387; *Gaulden v. State*, 11 Ga. 47; *Commonwealth v. Gibbs*, 4 Gray (Mass.), 146; *Price v. Grand Rapids, etc., R. R. Co.*, 18 Ind. 137. But where an attorney, in the course of other business, has obtained a knowledge of matters connected with the suit in question, he will not generally be prevented from acting against the party through whose business he obtained such knowledge. *Id.* And counsel may act as such at the same time for both parties to a transaction, and the fact that a contract is drawn by and under the advice of one, who at the time is counsel for one of the parties, when such fact is known to the other party, does not, in the absence of evidence of fraud or unfairness, invalidate or affect the contract. *Joslin v. Cowee*, 56 N. Y. (11 Sick.) 626; and see *Siegel v. Gould*, 7 Lans. 177; *ante*, 245 to 249.

§ 7. **Liability to third persons.** One who suffers an injury by an unauthorized appearance of an attorney for him, has a remedy by action against the attorney. *Smith v. Bowditch*, 7 Pick. (Mass.) 138; *Coit v. Sheldon*, 1 Tyler (Vt.), 304; *Field v. Gibbs*, Pet. (C. C.) 155. So, an attorney and his client have been both held liable, for an execution illegally issued by the former. *Newberry v. Lee*, 3 Hill (N. Y.), 523; see *Armstrong v. Dubois*, 1 Abb. Ct. App. (N. Y.) 8; S. C., 4 Keyes, 291; *Foster v. Wiley*, 27 Mich. 244; S. C., 15 Am. Rep. 185. But an attorney may so act under his general employment, to enforce a legal claim, as to render himself alone liable for a malicious prosecution or arrest. *Burnap v. Marsh*, 13 Ill. 535; and see *Hardy v. Keeler*, 56 id. 152. He does not, however, incur any civil liability for ordering a levy on property, if he acts in good faith and on reasonable

cause. *Hunt v. Printup*, 28 Ga. 297; see *Wigg v. Simonton*, 12 Rich. (S. C.) 583. And he is not chargeable with a trespass of the constable who has charge of the execution. *Seaton v. Cordray*, Wright (Ohio), 102. Nor is he responsible for conveying to an officer, his client's directions, for seizing goods on an execution. *Ford v. Williams*, 13 N. Y. (3 Kern.) 577.

An attorney who, by his representations and promised indorsement, induces a party to take an assignment of a debt placed in his hands for collection, by way of payment of a note against his client, thereby becomes personally responsible to the assignee for its collection. *Hazelrigg v. Brenton*, 2 Duv. (Ky.) 525. And where an attorney procures money to be advanced by a third person, in the prosecution of an action, without attempting to pledge the credit of his client therefor, the attorney alone is responsible to such third person. *Bell v. Mason*, 10 Vt. 509. So, a firm of attorneys, conducting collections in various parts of the country, who give receipts "for collection," are liable for collections made by their agents, unless they expressly limit their liability. *Bradstreet v. Everson*, 72 Penn. St. 124. But, where an attorney, without fraud, collects money as attorney, and pays it over to his client, although the one paying it shows he is entitled to have it refunded, an order will not be granted requiring the attorney personally to refund it. The fact of payment over should, however, be clearly shown in such a case. *Wilmerdings v. Fowler*, 55 N. Y. (10 Sick.) 641; S. C., 15 Abb. (N. S.) 86. As to liability for words spoken on a trial, see 1 Wait's Pr. 245.

§ 8. **Liability for costs, fees, etc.** In some cases an attorney is held liable for costs. Thus, in South Carolina, an attorney is held liable for sheriffs' and clerks' costs, where the plaintiff in the suit lives out of the State. *Benson v. Whitfield*, 4 McCord (S. C.), 149. So, in Georgia, an attorney instituting a suit for a plaintiff out of the State, is liable, if the suit is dismissed or the plaintiff cast, for all costs. *Carmichael v. Pendleton*, Dudley (Ga.), 173. And, in New York, an attorney is liable for costs to the amount of \$100, when he proceeds in a suit after his client has removed out of the State, whether the costs accrued before or after such removal. *Wright v. Black*, 2 Wend. 258; and see *Moir v. Brown*, 9 How. (N. Y.) 270; *Boyce v. Bates*, 8 id. 495; see 3 Wait's Pr. 538, 549, 550. So, where one is made lessor in ejectment, without his authority, the plaintiff's attorney, and not he, is liable for the costs. *People v. Bradt*, 6 Johns. 318.

It has been held, that an attorney who indorses his client's writ, thus, "A B, by C D, his attorney," is personally liable for costs, if the plaintiff avoid, or is unable to pay them. *Chapman v. Phillips*, 8 Pick. (Mass.) 25; *How v. Codman*, 4 Me. 79; but see *contra*, *Hackness v. Farley*, 11 id. 491; *Minor v. Smith*, 6 N. H. 219. And an agreement between an attorney and his client, that the former shall pay the costs of an action he has brought for his client, if unsuccessful, is illegal and void, and cannot be enforced by the client. *Low v. Hutchinson*, 37 Me. 196. Courts have power to order costs to be paid by counsel, in cases of gross misconduct or gross negligence, as a branch of the general power to punish for contempt. *Brown v. Brown*, 4 Ind. 627; *Kane v. Van Vranken*, 5 Paige (N. Y.), 62; *Ex parte Robbins*, 63 N. C. 309.

It is the well-settled general rule, that the attorney of record cannot be held liable for the fees of the officers of the court, unless upon proof of his express promise to pay them. See *Wires v. Briggs*, 5 Vt. 101; *Preston v. Preston*, 1 Dougl. (Mich.) 292; *Toule v. Hatch*, 43 N. H. 270; *Robbins v. Bridge*, 3 Mees. & W. 114; *Morse v. Porter*, 13 Serg. & R. (Penn.) 100. But the rule is otherwise in New York, where an attorney has been repeatedly held liable to the sheriff for fees on process delivered to him for execution. *Birkbeck v. Stafford*, 23 How. (N. Y.) 236; S. C., 14 Abb. 285; *Adams v. Hopkins*, 5 Johns. 252; *Campbell v. Cothran*, 56 N. Y. (11 Sick.) 279; and see *Trustees of Watertown v. Cowen*, 5 Paige, 510; *Judson v. Gray*, 11 N. Y. (1 Kern.) 408. So, an attorney is held personally liable to the prothonotary for fees in suits wherein he was either plaintiff or plaintiff in interest, as also for fees received by him, as attorney or client, due to the prothonotary. *Cone v. Donaldson*, 47 Penn. St. 363.

An attorney is not liable for the fees of a witness summoned to testify for his client, unless upon a special promise to pay them. *Sergeant v. Pettibone*, 1 Aik. (Vt.) 355.

ARTICLE IV.

RIGHTS AND PRIVILEGES OF ATTORNEYS.

Section 1. In general. Attorneys and counsel, being officers of the court, are entitled to its protection in all cases where they act to the best of their skill and knowledge, and conduct themselves with honor and integrity. So, there are various privileges and exemptions which attach to attorneys as officers of the courts

in which they are admitted, and there are others which arise in the course of their professional employment, all of which will be considered under appropriate heads. As it regards their privileges generally, it has been said there is nothing that counsel may not do in the prosecution and defense of the rights of their clients, provided the manner of doing it is courteous and respectful. *Wright v. State*, 13 Ga. 383.

§ 2. To compensation. It is the doctrine of the English common law that a counselor at law cannot maintain an action for his fees. 2 Broom & Had. 28 [Wait's ed.]; 3 Bl. Com. 28. This doctrine was early recognized, to some extent, in this country (see *Mooney v. Lloyd*, 5 Serg. & R. [Penn.] 411); and still prevails in the State of New Jersey. *Seeley v. Crane*, 3 Green (N. J.), 35; *Shaver v. Norris*, Penn. (N. J.) 63. In New York, however, counsel fees have always been recoverable on a *quantum meruit* (*Stevens v. Adams*, 23 Wend. 57; S. C., 26 id. 451); and generally, in the United States, the fees of an attorney or counselor now constitute a legal demand for which an action will lie. And while, as between party and party in a cause, the statutory fee bill fixes the amount of costs to be recovered, as between attorney or counselor and client, the former may recover whatever his services are reasonably worth, whether performed in or out of court. See *Balsbaugh v. Frazer*, 19 Penn. St. 95; *Vilas v. Downer*, 21 Vt. 419; *In re Paschal*, 10 Wall. (U. S.) 483. See 1 Wait's Pr. 245, 246. In other words, the compensation of the attorney is left to be governed by the express or implied agreement between him and his client. *Stow v. Hamlin*, 11 How. (N. Y.) 452; *Porter v. Parmly*, 7 Jones & Sp. (N. Y.) 219. And implied agreements between attorney and client stand upon the same footing with the like agreements between other parties. *Id.*; *Garfield v. Kirk*, 65 Barb. (N. Y.) 464. See *Webb v. Browning*, 14 Mo. 353; *Smith v. Davis*, 45 N. H. 566; *Quint v. Ophir, etc., Mining Co.*, 4 Nev. 304; *Lunning v. Kemp*, 22 Wis. 509; *Boylan v. Holt*, 45 Miss. 277. The attorney must prove the services rendered and their value. Opinions of attorneys may be received (*Brewer v. Cook*, 11 La. Ann. 637); and the value of the property involved in the suit may be taken into view. *Garfield v. Kirk*, 65 Barb. (N. Y.) 464; *Harland v. Lilienthal*, 53 N. Y. (8 Sick.) 438. So, the attorney may show the amount and character of his professional business, as tending to show his professional standing, and to sustain the propriety of his charges. *Phelps v. Hunt*, 40 Conn. 97. An attorney who makes a con-

tract with his client for a stipulated amount as his fee for attending to a litigation, cannot afterward recover on a *quantum meruit*, but can only claim such sum as he is entitled to under the contract with the client. *Walker v. Bietry*, 24 La. Ann. 349; *Bull v. St. Johns*, 39 Ga. 78.

§ 3. **Special agreement for pay.** Although an attorney is permitted to enter into a special agreement with his client as to compensation, yet whenever such an agreement greatly inures to the advantage and benefit of the attorney, the court will scrutinize it with great care. In such cases, all presumptions are in favor of the client and against the propriety of the transaction, and the burden of proof is upon the attorney to show, by extrinsic evidence, that all was fair and just, and that his client acted understandingly and with a full knowledge of all the facts connected with the transaction, or the subject-matter. *Ford v. Harrington*, 16 N. Y. (2 Smith) 285; *Evans v. Ellis*, 5 Denio, 640; *Haight v. Moore*, 5 Jones & Sp. (N. Y.) 161; *Mason v. Ring*, 3 Abb. Ct. App. (N. Y.) 210; *McMahan v. Smith*, 6 Heisk. (Tenn.) 167. But evidence on the part of a defendant that the plaintiff has agreed to give a portion of the recovery to his attorney is incompetent. Such an agreement is lawful, and does not discredit, as a witness, the party making it. *Sussdorff v. Schmidt*, 55 N. Y. (10 Sick.) 319. So, an agreement by an attorney to commence and conduct and pay all the expenses of a suit, and give the plaintiff a certain share of the proceeds, has been sustained. *Fogerty v. Jordan*, 2 Robt. (N. Y.) 319. See *Allard v. Lamirande*, 29 Wis. 502; *Stearns v. Felker*, 28 id. 594. As has likewise an agreement that the attorney shall be first paid out of the funds recovered (*Christie v. Sawyer*, 44 N. H. 298); and that the costs to be recovered in the suit shall belong to the attorney (*Ely v. Cooke*, 28 N. Y. [1 Tiff.] 365); and that the attorney shall have a percentage on the amount recovered in the suit. *Ryan v. Martin*, 18 Wis. 672; *Benedict v. Stuart*, 23 Barb. (N. Y.) 420; *White v. Roberts*, 4 Dana (Ky.), 172; *Tapley v. Coffin*, 12 Gray (Mass.), 420. But see *Elliott v. McClelland*, 17 Ala. 206; *Boardman v. Thompson*, 25 Iowa, 487; *Judah v. Trustees*, 16 Ind. 56. So, a parol assignment of a cause by a plaintiff to his attorney, in consideration of the attorney's former services and advancements, has been held valid. *Jordan v. Gillen*, 44 N. H. 424. But an agreement between attorney and client, after the former has been employed, by which the original contract is varied, and greater compensation secured to

the attorney, has been held void. *Lecatt v. Sallee*, 3 Port. (Ala.) 115. And so of an agreement by a solicitor, to defend a suit concerning land, in consideration of being allowed the rents and profits of the land, pending the suit. *Merritt v. Lambert*, 10 Paige (N. Y.), 352. It is not, however, against public policy for a party claiming title to land to enter into a contract with an attorney, by which it is agreed that the attorney shall commence legal proceedings for its recovery and pay the costs, and in consideration of his services and expenditure of money, have an undivided one-half of all the land recovered, and the undivided one-half of all that may be recovered or obtained by reason of any compromise or settlement of the matter, and that the party claiming the land shall not make any settlement or compromise without the consent of the attorney. Such contract constitutes the attorney the equitable owner of the undivided one-half of whatever shall result from the prosecution or compromise of the suit instituted by him to recover the land. *Hoffman v. Vallejo*, 45 Cal. 564.

It is part of the general duties of members of the bar to act as counsel for persons accused of crime and destitute of means, upon appointment by the court, when not inconsistent with their duties to others, and for compensation they must trust to the possible future ability of the parties. *Rowe v. Yuba County*, 17 Cal. 61; *People v. Supervisors of Albany*, 28 How. (N. Y.) 22; *Wright v. State*, 3 Heisk. (Tenn.) 256; *Elam v. Johnson*, 48 Ga. 348. They have no legal claim to be paid for their services in such cases out of the county funds. *Ib.* But see *Webb v. Baird*, 6 Ind. 13; *Samuels v. Dubuque*, 13 Iowa, 536.

An attorney is not entitled to recover for services, which, through his own neglect, proved to be of no value to his client. *Nixon v. Phelps*, 29 Vt. 198; *Bowman v. Tallman*, 40 How. (N. Y.) 1. Nor is he entitled to compensation for services, when he detains money collected for an unreasonable time, or until he is sued for it. *Bredin v. Kingland*, 4 Watts (Penn.), 420; *Wills v. Kane*, 2 Grant's Cas. (Penn.) 60. So, an attorney or counsel cannot recover for such advice to a client as would enable, if not induce, him to elude the process of the law, nor for advice to the officer serving the process calculated to induce him to violate his duty. *Arrington v. Sneed*, 18 Tex. 135; *Goodenough v. Spencer*, 46 How. (N. Y.) 347; S. C., 2 N. Y. S. C. (T. & C.) 508.

§ 4. **Lien for costs.** As a general rule, an attorney at law, who is employed to prosecute a demand, has a lien upon any judg-

ment or recovery obtained through his services, for the fees or compensation due him therefor. *Pindar v. Morris*, 3 Cai. (N. Y.) 165; *Andrews v. Morse*, 12 Conn. 444; *Walker v. Sargeant*, 14 Vt. 247; 1 Wait's Pr. 246, 247. And this lien will be protected by the courts against any unfair dealings by the client with the right of action, or the judgment. *Ib.*; *Bradt v. Koon*, 4 Cow. 416; *Carter v. Davis*, 8 Fla. 183; *Boyer v. Clark*, 3 Neb. 161; *McKenzie v. Wardwell*, 61 Me. 136; *Howland v. Taylor*, 6 Hun, 237. The lien does not arise, however, until judgment, and before judgment the parties may settle the suit and give releases, without reference to any claims of attorneys for services previously rendered. *Foot v. Tewksbury*, 2 Vt. 97; *Potter v. Mayo*, 3 Me. 34; *Getchell v. Clark*, 5 Mass. 309; *Simmons v. Almy*, 103 id. 33. An attorney has a lien upon his client's papers in his possession, obtained in the course of his professional employment. *St. John v. Diefendorf*, 12 Wend. 261; *Ez parte Russell*, 1 How. (N. Y.) 149. Thus, he has a lien upon a note or order deposited with him for collection or suit (*Howard v. Osceola*, 22 Wis. 453; *Stewart v. Flowers*, 44 Miss. 513; *Dennett v. Cutts*, 11 N. H. 163); or upon a bond or mortgage in his hands for foreclosure (*Bowling Green Savings Bank v. Todd*, 52 N. Y. [7 Sick.] 489); but he has no lien upon papers of his client which came into his hands otherwise than in the course of his professional employment. *Henry v. Fowler*, 3 Daly (N. Y.), 199. And one member of a firm of attorneys has no lien for an individual demand upon papers received by his firm. *Bowling Green Savings Bank v. Todd*, 64 Barb. 146; S. C., 52 N. Y. (7 Sick.) 489.

In some of the States, as in Maine and Massachusetts, an attorney has a lien only by statute. See *Potter v. Mayo*, 3 Me. 34; *Baker v. Cook*, 11 Mass. 236; see *Wood v. Anders*, 5 Bush (Ky.), 601. So, in many respects, the law relative to the attorney's lien will be found to vary in the different States. In Illinois, it has been held, that an attorney's lien for his compensation upon a judgment which he has recovered, should be limited to the specific fees or disbursements taxable by law as costs, and included in the judgment. And that it does not extend to such sum as may be due by contract with his client as a general compensation for services. *Forsyth v. Beveridge*, 52 Ill. 268; and see *Humphrey v. Browning*, 46 Ill. 476; *Wells v. Hatch*, 43 N. H. 246; *Mansfield v. Dorland*, 2 Cal. 507. In a more recent case in New York, it was decided that an attorney has a lien upon a judgment recovered by him for any sum agreed upon

between him and his client as a compensation for his services, as well as for the costs in the judgment, and, to the amount of such lien, he is to be deemed an equitable assignee. *Marshall v. Meech*, 51 N. Y. (6 Sick.) 140; S. C., 10 Am. Rep. 572; see *Smith v. Young*, 62 Ill. 210. So, when the recovery is solely for costs, the judgment itself is legal notice of the lien, and this lien cannot be discharged by payment to any one but the attorney. *Leshner v. Roesner*, 3 Hun (N.Y.), 217; S. C., 5 N.Y. S. C. (T. & C.) 674. But when the judgment is for damages and costs it is not notice of the lien, even for the taxed costs, and such lien can be protected only by notice to the judgment debtor. *Marshall v. Meech*, 51 N. Y. (6 Sick.) 140; S. C., 10 Am. Rep. 572; see *Pleasants v. Kortrecht*, 5 Heisk. (Tenn.) 694; *Neil v. Staten*, 7 id. 290. The retaining of an attorney to prosecute an action and its commencement by him, gives him no lien upon what may, in the event of a trial, be recovered therein. *Pulver v. Harris*, 52 N. Y. (7 Sick.) 73; see *Casey v. March*, 30 Tex. 180. Possession, or the right of possession, by a person asserting a lien, is necessary to the existence of such lien. *St. John v. Diefendorf*, 12 Wend. 261; *Stewart v. Flowers*, 44 Miss. 513. In Pennsylvania, an attorney has no lien for his professional compensation on the papers of his client in his hands, or on money collected by him for his fees. *Walton v. Dickerson*, 7 Penn. St. 376. As to lien for costs, see 1 Wait's Pr. 246, 247.

§ 5. **Privileges generally.** Attorneys and counselors are supposed to be always present, during term, attending the court on behalf of their clients. *Walker v. Rushbury*, 9 Price, 27; *People v. Nevins*, 1 Hill (N. Y.), 154; and their official duties in court, therefore, are legally deemed to exempt them from being called on to fill many ordinary offices. Thus, in Pennsylvania, an attorney is privileged from serving as an overseer of the poor, supervisor of the roads, constable, and in similar offices. *Respublica v. Fisher*, 1 Yeates (Penn.), 350. But he is not privileged from serving in the militia. *Id.*; *Matter of Bliss*, 9 Johns. (N. Y.) 347.

It is an ancient privilege of attorneys to be exempt from arrest on *mesne* process, or being held to bail (see *Emmet's Case*, 2 Cai. [N. Y.] 387; *Gibbs v. Loomis*, 10 Johns. 463; *Commonwealth v. Ronald*, 4 Call [Va.], 97); because attorneys, being obliged to attend officially on the courts, are presumed to be always amenable. *Id.* See *Ogden v. Hughes*, 5 N. J. L. (2 South.) 718; *Sperry v. Willard*, 1 Wend. 32. So, an attorney

has always been regarded as privileged from arrest, while actually employed in the conduct or management of legal proceedings, and this privilege continues while the attorney is proceeding from his own private residence to his office for papers, etc., and from thence to court. See 1 Wait's Pr. 597; *Secor v. Bell*, 18 Johns. 52; *Corey v. Russell*, 4 Wend. 204; *Bohanan v. Peterson*, 9 id. 503; *Humphrey v. Cumming*, 5 id. 90; *Ricketts v. Gurney*, 1 Chitty, 682. But if an attorney ceases to practice for a year, not in consequence of any temporary absence or avocation, but by betaking himself to a profession or business incompatible with his practice as an attorney, his privilege ceases. *Brooks v. Patterson*, Col. Cas. 133; S. C., 2 Johns. Cas. 102. See *Cott v. Gregory*, 3 Cow. 22. He cannot, however, by plea, waive or destroy his privilege, for it is not allowed for his own sake, but for the sake of the court and the suitors in it. *Scott v. Van Alstyne*, 9 Johns. 216. Application must be made to the court. *Ib.*; see *Leal v. Wigram*, 12 id. 88; *Cole v. McLellan*, 4 Hill (N. Y.), 59. An attorney or counselor has a right, at all reasonable times, to enter a prison for the purpose of advising with his client. *Ex parte McClellan*, 1 Wheel. Cr. Cas. (N. Y.) 303. As to privileged communications, see *post*, art. 9.

ARTICLE V.

ACTION BY ATTORNEY AGAINST CLIENT.

Section 1. In general. The right of an attorney or counselor at law to maintain an action to recover compensation due him for professional services, has already been considered in a preceding section. See *ante*, art. 4, § 2. But he cannot recover of his client for professional services, without proving a retainer; and even proof of the actual performance of the services is not sufficient, where there is no proof of a knowledge or a recognition of the services by the client. *Burghart v. Gardner*, 3 Barb. (N. Y.) 64. And see *Hotchkiss v. LeRoy*, 9 Johns. 142; *Cooper v. Hamilton*, 52 Ill. 119.

§ 2. **Retainer.** The law warrants a party in giving faith and confidence, to one who, by law, is authorized to hold himself out as a public officer, clothed with power to represent others in the courts. Hence, where an attorney appears in an action for any party, the general rule is, that a retainer will be presumed, and the adverse party, having no notice or ground of suspicion, may act on that presumption. *Hamilton v. Wright*, 37 N. Y. (10

Tiff.) 502; *Turner v. Caruthers*, 17 Cal. 431; *People v. Mariposa Co.*, 39 id. 683; *Hains v. Galbraith*, 43 Ill. 309; *Ferguson v. Crawford*, 7 Hun, 25. So, in case of a corporation, as well as of an individual, appearance by an attorney, legally admitted to practice, is received as evidence of his authority to represent the party in court. *Osborn v. Bank of United States*, 9 Wheat. 738; *Manchester Bank v. Fellows*, 28 N. H. 302; *Schroendenbeck v. Phoenix Fire Ins. Co.*, 15 Wis. 632. And it is held that the authority to appear cannot be questioned in the court of appeal, if not objected to in the court below. *Id.*; *Noble v. Bank of Kentucky*, 3 A. K. Marsh. (Ky.) 263.

§ 3. **Proof of retainer.** Although the license of an attorney is *prima facie* evidence of his authority to appear for any person whom he professes to represent, he may, nevertheless, be compelled by the court to show his authority to appear for such party, at the instance of either party to the suit. *West v. Houston*, 3 Harr. (Del.) 15; *Boutlier v. Johnson*, 2 Browne (Penn.), 17; *Commissioners v. Purdy*, 36 Barb. (N. Y.) 266; *Clark v. Holliday*, 9 Mo. 711; 1 Wait's Pr. 563, 564. In order to invoke the exercise of this power of the court, the opposite party must state facts showing or tending to show that the attorney does not possess the authority which he assumes (*Howard v. Smith*, 1 Jones & Sp. [N. Y.] 124; *Thomas v. Steele*, 22 Wis. 207; *People v. Mariposa Co.*, 39 Cal. 683); otherwise the presumption arising from his license and appearance will prevail. *Id.*; see *McAlexander v. Wright*, 3 T. B. Monr. (Ky.) 194; *Hellman v. McWhennie*, 3 Rich. (S. C.) 364. The power of an attorney of record to act in the suit cannot be questioned on a collateral issue between third persons. *Dillard v. Crocker*, Spears' Ch. (S. C.) 20; *Ferguson v. Crawford*, 7 Hun, 25. Nor can objection to the right of counsel to appear in defense of an action be made after the term at which the appearance is first made. *Knowlton v. Plantation No. 4*, 14 Me. 20.

A mere parol retainer is sufficient to authorize an attorney to commence a suit. *Manchester Bank v. Fellows*, 28 N. H. 302. And as between the plaintiff and the defendant, an attorney is a competent witness to prove his authority to appear in the suit. *Caniff v. Myres*, 15 Johns. 246; *Foley v. Smith*, 12 N. J. L. (7 Halst.) 140; *Bridgton v. Bennett*, 23 Me. 420. So, the authority of the attorney to appear may be inferred from circumstances, as that he was the general attorney of the defendant, and the defendant, though knowing of it, did not object to his

appearance. *Bogardus v. Livingston*, 2 Hilt. (N. Y.) 236. And the admission that an attorney was retained by the person for whose use an action is brought, shows sufficient authority. *Cartwell v. Meniffee*, 2 Ark. 358.

An attorney, properly qualified and practicing as such, in the absence of a statutory provision or of a rule of court prohibiting it, can recover for services rendered upon the employment of a client, although he may not have been formally admitted to practice in the court where the services were rendered. And even if there is a statute or rule prohibiting such a recovery, unless there has been a formal admission, yet, if the services are rendered by a firm, one of whom is duly admitted, the partners may recover in a joint action for such services. *Harland v. Lilienthal*, 53 N. Y. (8 Sick.) 438. An attorney who acts as broker for his client, in negotiating the sale or pledge of personal property, is entitled to be paid as such; but he cannot also charge a counsel fee for conversations with his employer, in relation to the same transaction, unless by express contract. *Walker v. American Nat. Bank*, 49 N. Y. (4 Sick.) 659.

§ 4. **Unauthorized appearance.** An unauthorized attorney may appear in an action for a party, and the party may be bound by the judgment pronounced against him, unless there appear to be fraud or collusion in the case. *Williams v. Butler*, 35 Ill. 544; *Beckley v. Newcomb*, 24 N. H. 359; *Gager v. Babcock*, 48 N. Y. (3 Sick.) 154; S. C., 8 Am. Rep. 532; *Sheriff v. Smith*, 47 How. (N. Y.) 470; *Town of Delhi v. Graham*, 3 Hun, 407; 6 N. Y. S. C. (T. & C.) 49. The remedy of the party is against the attorney, for appearing and acting in his name without authority. *Blodgett v. Conklin*, 9 id. 442. Though, in some instances, where an attorney has assumed to appear for a party without authority, the courts, upon direct application, have granted relief, such as was consistent with the rights of all parties interested (Id.; *Denton v. Noyes*, 6 Johns. 296; *Ellsworth v. Campbell*, 31 Barb. 134; *Abbott v. Dutton*, 44 Vt. 546; *Campbell v. Bristol*, 19 Wend. 101); as in case of fraud or collusion, or where the attorney is insolvent. Id. So, it has been held, that although an authority will be presumed, when an attorney appears for a defendant not served with process, yet, if the defendant prove that he had no authority, his rights cannot be affected by the attorney's acts. *Hess v. Cole*, 23 N. J. L. (3 Zab.) 116; *Handely v. Statelor*, 6 Litt. (Ky.) 186. And, in Louisiana, the right of a party to repudiate under oath, the authority of

those who apparently represent him, upon the records of a court, whether as plaintiff or defendant, cannot be questioned. *Legere v. Richard*, 10 La. Ann. 669; see *Boykin v. Holden*, 6 id. 120; *Barnes v. Profflet*, 5 id. 117. A writ of error, sued out by an attorney, without the sanction of the plaintiff named in the writ, will be dismissed, on motion, at the attorney's cost. *Powell v. Spaulding*, 3 Iowa, 443; *Orichfield v. Porter*, 3 Ohio, 518; *Bell v. Ursury*, 4 Litt. (Ky.) 334; *Frye v. Calhoun County*, 14 Ill. 132.

Proceedings regularly had by attorneys who lawfully appeared for the respective parties, cannot, in the absence of fraud, be questioned by their clients because of the want of specific authority to do the acts done or consented to by them. *Palen v. Starr*, 7 Hun, 422.

ARTICLE VI.

ACTIONS AND PROCEEDINGS BY CLIENT AGAINST ATTORNEY.

Section 1. In general. See *ante*, 444, art. 3, §§ 1, 2.

§ 2. **For negligence.** See *ante*, 444, art. 3, § 2. The liability of the attorney in this country is not generally limited, as is the liability of counsel in England, to gross negligence or ignorance. See *Gambert v. Hart*, 44 Cal. 542; see 1 Wait's Pr. 242, 243. But the client must, in some way, be injured by his attorney's negligence, or he cannot maintain an action, even for nominal damages. *Harter v. Morris*, 18 Ohio St. 492; see *Suydam v. Vance*, 2 McLean, 99; *Grayson v. Wilkinson*, 13 Miss. 268. Whether given facts amount to actionable negligence is, in California, a question of law for the court. *Gambert v. Hart*, 44 Cal. 542. But, as a general rule, it is for the jury, under direction of the court. *Rhines v. Evans*, 66 Penn. St. 192; *Reece v. Rigley*, 4 Barn. & Ad. 202. In Arkansas, an attorney is liable only for gross negligence, or gross ignorance in the performance of his professional duties; and this is a question of fact to be determined by the jury, and is sometimes to be ascertained by the evidence of those who are conversant with, and skilled in, the same kind of business. *Pennington v. Yell*, 11 Ark. 212; see also *Evans v. Watrous*, 2 Port. (Ala.) 205; *Hogg v. Martin*, Riley (S. C.), 156; but see *Goodman v. Walker*, 30 Ala. (N. S.) 482.

It has been held to be actionable negligence for an attorney to lay the venue in the wrong county (*Kemp v. Burt*, 4 Barn. & Ad.

424); to bring his action in a court which has no jurisdiction (*Williams v. Gibbs*, 5 Ad. & El. 208); to prosecute the action too soon (*Hopping v. Quin*, 12 Wend. 517; *Long v. Orsi*, 18 C. B. 619; *Thwaites v. Mackenzie*, 3 Carr. & P. 341); or to delay bringing an action until it is too late to be available, and the claim is lost. *Smedes v. Elmendorf*, 3 Johns. 185. And see *Walpole v. Carlisle*, 32 Ind. 415; *Rhines v. Evans*, 66 Penn. St. 192; *Fitch v. Scott*, 4 Miss. (3 How.) 314. So, if an attorney disobeys the lawful instructions of his client, and a loss ensues, he is responsible (*Gilbert v. Williams*, 8 Mass. 51; *Armstrong v. Craig*, 18 Barb. 387); although he may have acted in good faith and done what he honestly supposed to be for the interests of his client. *Cox v. Livingston*, 2 Watts & S. (Penn.) 103. And he will be held liable for improperly dismissing his client's suit (*Evans v. Watrous*, 2 Port. [Ala.] 205); but he is not liable for omitting to defend a suit, if he be not instructed in the defense. *Boston v. Craig*, 2 Mo. 198. We have already seen in the preceding article (2), that an attorney who appears for another without authority, is liable to such person for injuries sustained by this intrusion. And see *O'Hara v. Brophy*, 24 How. (N. Y.) 379; *Bradt v. Walton*, 8 Johns. 298.

An attorney has been held liable for omitting to insert in a writ necessary words, as where he counts for \$12, instead of \$1,200, whereby his client sustains a loss. *Varnum v. Martin*, 15 Pick. (Mass.) 440. So, although it may not be the strict professional duty of an attorney to prepare or supervise the preparation of an affidavit for an attachment or a writ of attachment, yet if he undertakes to do so, and does it so negligently, or unskillfully, that his client in the progress of the cause suffers an injury by reason of such want of care and skill, the attorney is liable to an action. *Walker v. Goodman*, 21 Ala. (N. S.) 647. And an attorney employed to record a mortgage, but who neglects to do so until after other subsequent incumbrances have been recorded, is liable immediately to the mortgagee, for all the damages which are likely to be sustained by his default. *Miller v. Wilson*, 24 Penn. St. 114. See *Arnold v. Robertson*, 3 Daly (N. Y.), 298. An attorney is also liable to his client for the amount of damages consequent upon his gross neglect to collect a claim received by him for collection. *Reilly v. Cavanaugh*, 29 Ind. 435; *Dearborn v. Dearborn*, 15 Mass. 316; *Oldham v. Sparks*, 28 Tex. 425; *Eccles v. Stevenson*, 3 Bibb (Ky.), 517. And the law imputes to an attorney knowledge of defects in legal pro-

ceedings for the sale of property taken under his direction. *Galpin v. Page*, 18 Wall. (U. S.) 350.

§ 3. For accounting and payment. It is the general rule that an attorney is not liable to an action by his client for money collected until after demand made, or a direction to remit. *Rathbun v. Ingals*, 7 Wend. 320; *People v. Brotherson*, 36 Barb. (N. Y.) 662; *Pierse v. Thornton*, 44 Ind. 235; *Cummins v. M'Lain*, 2 Ark. 402; *Mardis v. Shackelford*, 4 Ala. 493; *Voss v. Bachop*, 5 Kans. 59. In other words, he is not considered in default until he receives orders from his principal. See *Krause v. Dorrance*, 10 Penn. St. 462; *ante*, 252 to 254. But although the general rule be as thus stated, circumstances may exist which will dispense with the necessity of a demand; as, when the attorney has been guilty of fraud or malpractice, or of culpable negligence in not giving notice of the receipt of the money in a reasonable time (*Glenn v. Cuttle*, 2 Grant's Cas. [Penn.] 273; *Denton v. Embury*, 10 Ark. 228; *ante*, 252); or when he puts in a sham plea for delay, or exhibits a manifest desire to baffle the plaintiff, or to withhold from him his just demand. *Krause v. Dorrance*, 10 Penn. St. 462. See *Cummins v. M'Lain*, 2 Ark. 402. So, an engagement by an attorney to pay over money, when collected, to a third party, and a failure to do so, dispenses with demand. *Mardis v. Shackelford*, 4 Ala. 493. If he has any doubt whether the debts collected belong to his client, all that he has any right to ask, is indemnity on paying over the money. *Marvin v. Ellwood*, 11 Paige, 365; *Sims v. Brown*, 6 N. Y. S. C. (T. & C.) 5.

An action for money had and received will lie against an attorney, who, having a debt to collect, receives in payment debts on himself or on others, without authority from his principal. *Houx v. Russell*, 10 Mo. 246. And if an attorney collects money for his client, and uses the money as his own, he may be held liable for interest thereon during such use. *Mansfield v. Wilkerson*, 26 Iowa, 482. See *Walpole v. Bishop*, 31 Ind. 156; *Hover v. Heath*, 3 Hun, 283; 5 N. Y. S. C. (T. & C.) 488. So, if he receives property from a defendant, in satisfaction of a client's judgment, and disposes of it without rendering an account, he may be charged the amount he received for it as money. *Christy v. Douglas*, Wright (Ohio), 485. And it is held that an attorney, like any other agent, is liable in trover for the conversion of the money of his principal. *Cotton v. Sharpstein*, 14 Wis. 226. A collecting agency, receiving and remitting

a claim to their own attorney, who collects the money and fails to pay it over, is liable for his neglect. *Bradstreet v. Everson*, 72 Penn. St. 124; *ante*, 266.

§ 4. Summary proceedings to collect, etc. Resort may be also had to the remedy by summary proceedings, to compel the payment of moneys collected by an attorney. See *Bowling Green Savings Bank v. Todd*, 52 N. Y. (7 Sick.) 489. And in order to give the right to proceed summarily against him, it is not essential that the attorney should have received the money in any suit or legal proceeding, or that he should have been employed to commence legal proceedings. It is enough if the money was received in his professional character; as, where the demand on which he received it was left with him under instructions to call for payment, or obtain better security, but without any directions to sue. *Matter of Dakin*, 4 Hill, 42; and see *Ex parte Staats*, 4 Cow. 76; *Matter of Aitkin*, 4 Barn. & Ald. 47; *Wilmerdings v. Fowler*, 55 N. Y. (10 Sick.) 641; 14 Abb. (N. S.) 249; 15 *id.* 86. It is held, however, that a summary application to compel an attorney to pay over money received in his professional capacity, is only entertained on motion of the client. It is a privilege given to clients for their protection against exactions and overreachings, and is not extended either to outside parties, or to assignees of clients. *Hess v. Joseph*, 7 Rob. (N. Y.) 609. The remedy is regulated, to a great extent, by local practice.

§ 5. Other relief. A default for not pleading will be opened, where it is suffered by the neglect of an attorney, who is insolvent. *Meacham v. Dudley*, 6 Wend. 514. So, where the delay or irregularity in the cause has proceeded from the gross negligence or ignorance of the attorney, the court will, in its discretion, relieve the client against the consequences of the delay or irregularity. *Pratt v. Adams*, 7 Paige, 615.

A right of action to recover back money paid to an attorney, in advance, for services to be rendered at a future day, accrues from the time when he neglects or refuses to render the service. *Benton v. Craig*, 2 Mo. 198.

ARTICLE VII.

CHANGE, ETC., OF ATTORNEYS.

Section 1. In general, by client. A party to a suit has the right to discharge his attorney when he pleases, and the attor-

ney thus discharged has no right to charge for his services afterward. *Wells v. Hatch*, 43 N. H. 246; *Carver v. United States*, 7 Ct. of Cl. 499; *In re Paschal*, 10 Wall. 483; *Arrington v. Sneed*, 18 Tex. 135. But a party cannot insist, as a matter of right, upon a substitution of one attorney for another, without the payment of the costs earned. *Board of Supervisors v. Brodhead*, 44 How. (N. Y.) 411. And, upon the application for an order of substitution, the court will see to it, that any rights of the attorney, as to compensation for past services, etc., are properly protected. *Id.* *Howard v. Taylor*, 6 Hun, 237; *Hoffman v. Van Nostrand*, 14 Abb. (N. Y.) 336; *Walton v. Sugg*, Phill. L. (N. C.) 98; *Sloo v. Law*, 4 Blatchf. 268; and see *Gardner v. Taylor*, 5 Abb. N. S. (N. Y.) 33; S. C., 36 How. 63; 1 Wait's Pr. 248. If the attorney of one of the parties dies, or becomes incapable of conducting the suit, the opposite party should give the other notice to appoint a new attorney, before taking any new proceedings. *Given v. Driggs*, 3 Cai. (N. Y.) 150.

§ 2. *Withdrawing, by attorney.* An attorney may be changed on his own consent, but the consent must be filed on an order entered, substituting in his place the new attorney, and notice of the order must be served upon the opposite party. *Ryland v. Noakes*, 1 Taunt. 342; *Dorlon v. Lewis*, 7 How. (N. Y.) 132. But in no case can an attorney be changed without leave of the court, or upon an order of a judge of the court. *Anonymous*, 7 Mod. 50; *Mumford v. Murray*, Hopk. 369; *Krekeler v. Thaulé*, 49 How. (N. Y.) 138; 1 Wait's Pr. 248. And until so changed (upon notice of the change or withdrawal, given to the opposite attorney), he will be held responsible, and service upon him will be deemed good. *United States v. Curry*, 6 How. (U. S.) 106; *Boyd v. Stone*, 5 Wis. 240.

§ 3. *Assistants or substitutes.* An attorney employed to prosecute or defend an action has no implied authority to employ a substitute to act in his place. The relation being one of personal trust and confidence, the attorney cannot delegate his duties, without the consent of his client. *Matter v. Bleakly*, 5 Paige, 311; *Hitchcock v. McGehee*, 7 Port. (Ala.) 556. But, if the client knew of the substitution, and either accepts the services of the substitute, or does not object, he is bound by the substitution, and must pay whatever he has agreed to pay the principal attorney. *Smith v. Lipscomb*, 13 Tex. 532; and see *King v. Pope*, 28 Ala. 601; *Johnson v. Cunningham*, 1 id. 249; *Fenno v. English*, 22 Ark. 170. So, an attorney employed to

manage a suit may, in the absence of his employer, engage assistant counsel, and such counsel may charge his fees to the attorney or his client. *Briggs v. Georgia*, 10 Vt. 68. Though it is otherwise, if the party, or his authorized agent, is present at the trial. *Id.* And, as a general rule, the attorney in a case has no power, as such, to employ assistant counsel at the expense of his client; and such employment will not bind his client, unless it can be fairly inferred, from the facts in the case, that such authority was given to him by the client. *Cook v. Ritter*, 4 E. D. Smith (N. Y.), 253; *Scott v. Howsie*, 13 Vt. 50; *Paddock v. Colby*, 18 *id.* 485. Where an attorney receives a demand for collection, and, without the client's knowledge, delivers it to another attorney, who collects and fails to pay it over, the first attorney is liable for the money. *Pollard v. Rowland*, 2 Blackf. (Ind.) 22; *Bradstreet v. Everson*, 72 Penn. St. 124; *Kellogg v. Norris*, 10 Ark. 18; see *Lewis v. Peck*, 10 Ala. 142; *Herron v. Bullitt*, 3 Sneed (Tenn.), 497; *Cummins v. M'Lain*, 2 Ark. 402.

An attorney at law, who has been elected a judge, cannot substitute another to perform his subsisting professional contracts; for, what a person is legally incapacitated to do himself, he cannot do by another. *Ratcliff v. Baird*, 14 Tex. 43.

§ 4. **Partners of attorney.** The law recognizes professional associations between attorneys for the prosecution of their particular business, as lawful, and admits of no distinction between them and other partnerships, at least so far as relative rights and liabilities are involved. As in other partnerships, each member is entitled to any benefit accruing from the conduct of the others, and all are liable for the acts and receipts of each within the scope of the partnership business. *Livingston v. Cox*, 6 Penn. St. 360. Thus, although but one of them appears in and conducts a suit in court, all are entitled to the fees earned, and an action may be maintained in their joint names. *Warner v. Griswold*, 8 Wend. 665. So, the service of papers upon the partner not appearing is service upon all. *Lansing v. McKillup*, 7 Cow. 416. And attorneys practicing in partnership are equally responsible for money collected and not paid over, though one of them had no participation in that particular transaction. *Dwight v. Simon*, 4 La. Ann. 490; *M'Farland v. Crary*, 8 Cow. 253. So, if a suit be unskillfully or negligently conducted by one of the partners, they are all responsible to the client in an action for damages. *Warner v. Griswold*, 8 Wend. 665; *Liv-*

Ingston v. Cox, 6 Penn. St. 360. If a firm be employed, the client has a right to the services of all of its members. *Cholmondeley v. Clinton*, 19 Ves. 261. And if one of them die, the engagement is at an end, unless by its terms it is still to subsist, and the business is to be attended to by the survivors. For the services rendered during the continuance of the engagement, the firm is entitled to compensation; but by the death of one of the persons employed, the engagement is determined if its completion requires any exercise of professional skill. *McGill v. McGill*, 2 Metc. (Ky.) 258. Attorneys who are partners are not, however, released from the obligations they have assumed, so far as their clients are concerned, by a dissolution of their firm, or by any other act or agreement between themselves. *Walker v. Goodrich*, 16 Ill. 341; *Pool v. Gist*, 4 McCord (S. C.), 259; *Wilkinson v. Griswold*, 12 Sm. & M. (Miss.) 669; *Morgan v. Roberts*, 38 Ill. 65.

In New Jersey it has been held not to be lawful for two or more attorneys to create a partnership and prosecute and defend suits in the name of the firm. *Wilson v. Wilson*, 5 N. J. L. (2 South.) 791.

§ 5. **Clerks.** During an attorney's absence, his clerk represents him as to all ordinary business of the office (*Power v. Kent*, 1 Cow. 211); and the attorney is bound by the acts and declarations of his clerk, in all matters within the scope of the latter's agency. *Ib.*; *Birkbeck v. Stafford*, 23 How. (N. Y.) 236; S. C., 14 Abb. 285. But however extensive the general powers of the clerk may be, he cannot discontinue an action without the consent of his principal (*Irvine v. Spring*, 35 How. [N. Y.] 479; S. C., 7 Rob. 293); nor can he bind the attorney's client by a discharge, without satisfaction, of a debt due the client. Even the attorney has no authority to do this. *Carter v. Talcott*, 10 Vt. 471.

ARTICLE VIII

DEALINGS BETWEEN ATTORNEY AND CLIENT.

Section 1. In general. The highest degree of good faith is required from an attorney, who, while the relation and the confidence incident to it, exists enters into bargains and dealings with his client. The confidential nature of the relation enables the attorney to exercise a strong influence over the actions of his client, puts it in his power to avail himself of his necessities, his

good nature, liberality and credulity; and hence the law not only watches over all the transactions of parties in this predicament, but often interposes to declare void transactions which, between other parties, would be held unobjectionable. See *Bibb v. Smith*, 1 Dana (Ky.), 582; *Mills v. Mills*, 26 Conn. 213; *Starr v. Vanderheyden*, 9 Johns. 253; *Downing v. Major*, 2 Dana (Ky.), 228; *Payne v. Avery*, 21 Mich. 524. But where the relation of attorney and client is completely dissolved, and the parties are no longer under the antecedent influence, this rule ceases, and they stand upon the rights and duties common to all other persons. *Gibson v. Jeyes*, 6 Ves. 277; *Rose v. Mynatt*, 7 Yerg. (Tenn.) 30; *Phillips v. Overton*, 4 Hayw. (Tenn.) 291; *Mason v. Ring*, 3 Abb. Ct. App. (N. Y.) 210.

§ 2. **Presumptions.** Whenever a contract between an attorney and his client inures greatly to the advantage and benefit of the attorney, the court will scrutinize the transaction with extreme vigilance. In such cases, all presumptions are in favor of the client, and against the propriety of the transaction, and the burden of proof is upon the attorney to show, by extrinsic evidence, that all was fair and just, and that his client acted understandingly and with a full knowledge of all the facts connected with the transaction or the subject-matter. *McMahon v. Smith*, 6 Heisk. (Tenn.) 167; *Jennings v. McConnell*, 17 Ill. 148; *Haight v. Moore*, 5 Jones & Sp. (N. Y.) 161; *Kisling v. Shaw*, 33 Cal. 425. So, where a person acting as attorney, agent, or confidential adviser of another receives a gift from the latter, the presumption is against the propriety and validity of the transaction; but this presumption may be overcome by evidence that the transaction was voluntary and fair. *Nesbit v. Lockman*, 34 N. Y. (7 Tiff.) 167; *Burling v. King*, 46 How. (N. Y.) 452; S. C., 2 N. Y. S. C. (T. & C.) 545.

§ 3. **Relief granted to client.** In case of hard and unconscionable bargains between a client and his attorney, made under the pressure of adverse circumstances, equity will afford appropriate relief. *Downing v. Major*, 2 Dana (Ky.), 228; and see *Miles v. Erwin*, 1 McCord's Ch. (S. C.) 524; *De Rose v. Fay*, 4 Edw. (N. Y.) 40; *Brock v. Barnes*, 40 Barb. (N. Y.) 521. If an attorney conceals from his client a proposition made by the debtor to the client, through the attorney, and the latter derives a benefit from such concealment, it is a fraud, and he cannot profit by the concealment. *Hoopes v. Burnett*, 26 Miss. 428. So, if an attorney deceives his client by false representations, or knowingly permits

him to be deceived by the false representations of others, he violates his duty as such, and will not be permitted to avail himself of a contract made under such circumstances. *Smith v. Thompson*, 7 B. Monr. (Ky.) 305; *Marshall v. Joy*, 17 Vt. 546; see *Trotter v. Smith*, 59 Ill. 240. And the receipt by a client from his attorney of a part of the proceeds of his claim, when more might have been collected by the employment of ordinary care and skill, is neither an accord and satisfaction, nor an estoppel. *Goodman v. Walker*, 30 Ala. 482.

§ 4. **Protection to attorney.** While a bargain, between attorney and client, is viewed with great jealousy and suspicion, and while its entire fairness must be shown by the attorney who claims the benefit of it, there is no inexorable rule pronouncing its illegality. Thus, a deed from a client to his attorney and counsel, for the consideration of affection, and also for a sum of money, though much less than the value of the land conveyed, will not be set aside, in the absence of evidence of incapacity or imbecility in the grantor, or of fraud and imposition by the grantee. *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344. The presumption of fraud or undue influence is not so strong in law, that it cannot be overcome by evidence; and if the attorney can show that all was fair, and that the client acted freely and understandingly, he will be protected. See *Brock v. Barnes*, 40 Barb. 521; *Nesbit v. Lockman*, 34 N. Y. (7 Tiff.) 167; *Miles v. Ervin*, 1 McCord's Ch. (S. C.) 524.

§ 5. **Purchases adverse to client.** While the relation of attorney and counsel exists, the attorney is not permitted to take advantage of his client's affairs or speculate upon his interests. Hence, the law forbids an attorney to purchase, against the interest of his client, property sold in the course of litigation, in which he is retained, and holds such sales void, or the attorney will be treated as the trustee of the client. *Harper v. Perry*, 28 Iowa, 57; *Hawley v. Cramer*, 4 Cow. 717; *Davis v. Smith*, 43 Vt. 269; *Hatch v. Fogerty*, 40 How. (N. Y.) 492; S. C., 10 Abb. (N. S.) 147; *Warren v. Hawkins*, 49 Mo. 137; *ante*, 246.

§ 6. **Attorney held as trustee.** In many cases a client may require an estate purchased by the attorney to be held in trust for the former. *Wheeler v. Willard*, 44 Vt. 640. Thus, if an attorney purchases an opposing or outstanding title to land, the knowledge of which he has obtained during the continuance of professional relations to his client, such purchase will inure to the benefit of the client, while he holds the land, or to that of

his vendee, after he has conveyed his interest. *Henry v. Raman*, 25 Penn. St. 354; *Hockenbury v. Carlisle*, 5 Watts & S. (Penn.) 348; and see *Moore v. Bracken*, 27 Ill. 23; *Giddings v. Eastman*, 5 Paige, 561; *ante*, 246. The *cestui que trust* must, however, do equity by reimbursing the outlay and costs of the trustee, unless it may be in a case of manifest fraud intended and attempted to be perpetrated. *Smith v. Brotherline*, 62 Penn. St. 461.

ARTICLE IX.

PRIVILEGED COMMUNICATIONS.

Section 1. In general. It is the general rule, that communications between attorney and client in reference to all matters which are the proper subject of professional employment are privileged. This includes all communications made by a client to his attorney or counsel, for the purposes of professional advice or assistance, whether such advice relates to a suit pending, one contemplated, or to any other matter proper for such advice or aid. *Yates v. Olmsted*, 56 N. Y. (11 Sick.) 632; *Britton v. Lorenz*, 45 N. Y. (6 Hand) 51; *Bigler v. Reyher*, 43 Ind. 112; *McClellan v. Longfellow*, 32 Me. 494; *Johnson v. Sullivan*, 23 Mo. 474; *Wetherbee v. Ezekiel*, 25 Vt. 47. And the privilege extends equally to both parties. *Carnes v. Platt*, 4 Jones & Sp. (N. Y.) 360; S. C., 15 Abb. (N. S.) 337; 59 N. Y. (14 Sick.) 405; *Minet v. Morgan*, L. R., 8 Ch. 361. So, it extends to an attorney employed to draw a deed (*Linthicum v. Remington*, 5 Cranch [C. C.], 546); and to an interpreter employed to translate between the attorney and the client (*Parker v. Carter*, 4 Munf. [Va.] 273); and a communication made by a client to an attorney's clerk, in regard to a suit prosecuted by the clerk's principal as attorney, is equally privileged as if made to the attorney in person. *Landsberger v. Gorham*, 5 Cal. 450; *Sibley v. Waffle*, 16 N. Y. (2 Smith) 180. Communications made to a prosecuting attorney, relative to criminals or suspected persons, are likewise privileged, and cannot be divulged without the consent of the person making them. *Oliver v. Pate*, 43 Ind. 132; *State v. Hazleton*, 15 La. Ann. 72. And a sheriff is entitled to the same privilege, in his communications with his attorney, as other persons. *Paxton v. Steckel*, 2 Penn. St. 93. But the rule does not extend to the protection of communications made to mere conveyancers, or to a scrivener.

Matthews' Estate, 5 Penn. Law J. Rep. 149; *Randel v. Yates*, 48 Miss. 685.

The privilege is accorded on grounds of public policy, and in order to facilitate the administration of justice. That the attorney is willing to divulge the communications is not enough to warrant receiving them. *Chirac v. Reinicker*, 11 Wheat. 280; *Jenkinson v. State*, 5 Blackf. (Ind.) 465. And where they are made by two or more clients jointly, to their common legal adviser, the seal of confidence can only be removed by all of them; the consent of a majority is not even sufficient, and one or more of them cannot require a disclosure as evidence against the others, without their consent. *Whiting v. Barney*, 38 Barb. 393; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 596; see *Chahoon v. State*, 21 Gratt. (Va.) 822. The privilege of the attorney extends to all information derived from his client, as such, either by oral communications, or from books or papers shown to him by his client, or placed in his hands in his character of attorney or counsel by such client. *Crosby v. Berger*, 11 Paige, 377. And the privilege is not affected by the fact that no fee was asked or expected. *McManners v. State*, 2 Head (Tenn.), 213; *March v. Ludlum*, 3 Sandf. Ch. (N. Y.) 35. The relation of attorney and client must, however, exist at the time, and the communication must be made for the purpose of obtaining advice in regard to legal rights. *Earle v. Grout*, 46 Vt. 113; see *Childs v. Delaney*, 1 N. Y. S. C. (T. & C.) 506. The burden lies on him who seeks to exclude communications as privileged, to show facts constituting the privilege. *Id.*

§ 2. **Exceptions and limits to rule.** The rule as to the exclusion of testimony on privileged communications, should be strictly construed. *Satterlee v. Bliss*, 36 Cal. 487. The communications must be of a confidential and professional character, and the attorney must be acting for the time being, in the character of legal adviser, or the party must have good reason to suppose he is so acting (*Coon v. Swan*, 30 Vt. 6); and acting upon the very matter to which the communication referred. *Branden v. Gowing*, 7 Rich. (S. C.) 459; *McManus v. State*, 2 Head (Tenn.), 213; *Flack v. Neill*, 26 Tex. 273. An attorney is bound to testify, like any other witness, to statements made by the client to other persons, or by other persons to the client, or to each other in his presence (*Gallagher v. Williamson*, 23 Cal. 331); and generally, an attorney may be required to disclose facts which he learned from other sources than his client. *Crosby v. Berger*, 11 Paige, 377; *Rogers v. Dare*, Wright

(Ohio), 136; *Hunter v. Watson*, 12 Cal. 363; *Beeson v. Beeson*, 9 Penn. St. 279. And he may be required to testify as to acts done by the client, in his presence, such as the execution of a writing, though he was present in consequence of his engagement as counsel. *Patten v. Moor*, 29 N. H. 163. Communications made by one who is a nominal party, but has no interest in the suit, are not privileged (*Allen v. Harrison*, 30 Vt. 219); nor does the privilege extend to information received, from the party, by one in the character of a friend, and not as counsel (*Hoffman v. Smith*, 1 Cal. 157; *Goltra v. Wolcott*, 14 Ill. 89); nor to a communication voluntarily made to counsel, after he has refused to be employed by the party making it. *Setzar v. Wilson*, 4 Ired. L. (N. C.) 501. So, where the attorney or counsel has an interest in the facts communicated to him, or when their disclosure becomes necessary to protect his own personal rights, he is exempted from the obligation of secrecy. *Rochester City Bank v. Suydam*, 5 How. (N. Y.) 254; see *Mitchell v. Bromberger*, 2 Nev. 345; *Nave v. Baird*, 12 Ind. 318.

The privilege does not extend to a mere conveyancer (*Matthews' Estate*, 1 Phil. [Penn.] 292); nor to an attorney who is merely employed to draw a deed or mortgage without giving any legal advice in regard thereto (*Hutton v. Robinson*, 14 Pick. [Mass.] 416; *De Wolf v. Strader*, 26 Ill. 225; *Borum v. Fouts*, 15 Ind. 50; *Randel v. Yates*, 48 Miss. 685; but see *Linthicum v. Remington*, 5 Cranch [C. C.], 546); nor to a student at law, because studying in an attorney's office, or under his direction (*Holman v. Kimball*, 22 Vt. 555; *Barnes v. Harris*, 7 Cush. [Mass.] 576); nor to third persons present at a conference between attorney and client. *Hay v. Morris*, 13 Gray (Mass.), 519; *Goddard v. Gardner*, 28 Conn. 172.

§ 3. **Presence of both parties.** Agreements made in the presence of an attorney, between his client and the opposite party, are not privileged. *Carr v. Weld*, 15 N. J. L. (3 Green) 314. Nor is a communication made by one party to his attorney and counsel, in the presence of the other party, privileged. *Dunn v. Amos*, 14 Wis. 106; *Whiting v. Barney*, 30 N. Y. (3 Tiff.) 330; see *Hemenway v. Smith*, 28 Vt. 701. And the same is true of communications by one party to the attorney of the other, looking toward a compromise. *McLean v. Clark*, 47 Ga. 24. So, where two parties select the same attorney, and make their communications in the presence of each other, in regard to the same subject-matter, each party waives his right to regard those communications as confidential, and in asserting their rights under

the contract, each is entitled to a disclosure of its stipulations. *Parish v. Gates*, 29 Ala. 254.

An attorney is not privileged as a witness from communicating facts concerning his client, when he himself is a party to the transaction. *Jeanes v. Fridenberg*, 3 Penn. Law J. Rep. 199.

§ 4. **Production of papers.** An attorney, who, as such, has been intrusted with papers, is not bound to produce them in evidence, on the call of the opposite party, or of a third person. *Kellogg v. Kellogg*, 6 Barb. 116; *Durkee v. Leland*, 4 Vt. 612; *Lynde v. Judd*, 3 Day (Conn.), 499; *People v. Benjamin*, 9 How. (N. Y.) 419; 2 Wait's Pr. 536; 1 id. 240. But all papers intrusted to an attorney in professional confidence are not necessarily to be deemed confidential communications (*Mitchell's Case*, 12 Abb. [N. Y.] 249); and it has been held, that their production can be resisted only when a controversy exists, or is anticipated between the parties, in relation to the subject on which communications were made to counsel, on the documents intrusted to him. *Peck v. Williams*, 13 id. 68. An attorney who has in his possession receipts which his client could be compelled to produce or disclose, can also be compelled to produce them or testify as to their contents. *Ex parte Maulsby*, 13 Md. 625; *Andrews v. Ohio, etc., R. R. Co.*, 14 Ind. 169.

§ 5. **Waiving privilege.** The client may waive his privilege, and when he calls upon the attorney to testify, or his consent is in some way shown, the attorney may be required to do so. *Benjamin v. Coventry*, 19 Wend. 353; *Fossler v. Schriber*, 38 Ill. 172; *Riddles v. Aikin*, 29 Mo. 453. And where the plaintiff examines his attorney as a witness, he thereby waives his privilege, and, upon a cross-examination, the attorney is bound to answer generally. *Crittenden v. Strother*, 2 Cranch (C. C.), 464; see *King v. Barrett*, 11 Ohio St. 261; *Woburn v. Henshaw*, 101 Mass. 193.

§ 6. **Termination of privilege.** The privilege endures forever, unless removed by the client (*Bank of Utica v. Mersereau*, 3 Barb. Ch. [N. Y.] 528, 596); and the attorney cannot, after he ceases to be the attorney of a party, disclose what was communicated to him in that capacity. *Andrews v. Thompson*, 1 Houst. (Del.) 522; *Yordon v. Hess*, 13 Johns. 492. But if, after that relation has ceased, the client voluntarily repeats to the attorney what he had communicated during the existence of the relation, the attorney is a competent witness as to this communication. Id.; and see *Williams v. Benton*, 12 La. Ann. 91. So, the privilege ceases after the death of the client, where the

solicitor has been made his executor and residuary legatee. *Crosby v. Berger*, 4 Edw. (N.Y.) 254; S. C. affirmed, 11 Paige, 377.

§ 7. What are privileged communications. It has been held, that an attorney cannot be compelled to testify as to what claim or title he was employed to maintain (*Chirac v. Reinicker*, 11 Wheat. 280); nor, as to the condition and appearance of a deed of trust and the trust notes at the time they were exhibited to him on the occasion of his employment for the purpose of foreclosing the deed of trust (*Gray v. Fox*, 43 Mo. 570); nor, as to whether or not a certain guaranty, written above the payee's name, in a different handwriting, on a back of a note, was there when placed in his hands for collection. *Dietrich v. Mitchell*, 43 Ill. 40. And the attorney of a plaintiff in ejectment, who is administrator of an estate, cannot be compelled to testify whether or not he is employed to bring the suit for the individual benefit of his client. *Stephens v. Mattox*, 37 Ga. 289. So, where an attorney had erased an indorsement on a bond, held by his client, on which a suit was pending, and had no knowledge of the contents of the indorsement, except what was obtained as attorney in the cause, he was held not to be bound to testify as to those contents. *Crawford v. M'Kissack*, 1 Port. (Ala.) 433. In an action on a promissory note, the plaintiff's attorney was called as a witness to prove that the note was not the property of the plaintiff. He declined to state any communications made to him by his client, and the court refused to compel him. *Miller v. Weeks*, 22 Penn. St. 89.

§ 8. What not privileged. An attorney may, however, be compelled to disclose the name of the person by whom he was employed (*Martin v. Anderson*, 21 Ga. 301; *Brown v. Payson*, 6 N. H. 443; *Gower v. Emery*, 18 Me. 79); the character in which his client employed him (*Beckwith v. Benner*, 6 C. & P. 681); the time when an instrument was put into his hands (*Brown v. Payson*, 6 N. H. 443; *Wheatley v. Williams*, 1 Mees. & Wels. 533); collateral facts, as that a bond was lodged with the client, by way of indemnity, or that he expressed himself satisfied with a certain security. *Heister v. Davis*, 3 Yeates (Penn.), 4. He may also be examined as to the handwriting of his client (*Johnson v. Davenport*, 19 Johns. 134); or be called to prove the identity of his client (*Beckwith v. Benner*, 6 C. & P. 681); or to disclose terms of compromise offered by him to his client's creditors (*M'Favish v. Dunning*, Anth. N. P. [N. Y.] 82; id. 113); and a question as to the amount of an attorney's fee, and the terms on which it was paid, when relevant, is allow-

able. *Shaughnessy v. Fogg*, 15 La. Ann. 330; *Smithwick v. Evans*, 24 Ga. 461. So, an attorney who draws up a will is competent to testify of its contents, in order to set it up as a lost will. *Graham v. O'Fallon*, 4 Mo. 338.

Where the attorney and client both engage in committing a wrongful act, the former cannot refuse to disclose the facts of the transaction, on the ground that his knowledge thereof resulted from the relationship of attorney and client. *Dudley v. Beck*, 3 Wis. 274. And facts stated to an attorney, to show that the cause in which he is sought to be retained, does not conflict with the interests of a client for whom he is already employed, are not confidential communications. *Heaton v. Findlay*, 21 Penn. St. 304. So, when an attorney, while acting professionally for a client, receives at the latter's request a deed of his land, and conveys it to a third party, no consideration moving in either of the transactions, these facts are not privileged. *Hager v. Shindler*, 29 Cal. 47.

ARTICLE X.

DISBARRING.

Section 1. In general. The power to disbar an attorney is possessed by all courts which have authority to admit attorneys to practice. But it is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession. And it has been said that a removal from the bar should never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired. See *Bradley v. Fisher*, 13 Wall. 335; *Ex parte Garland*, 4 id. 333, 379; *Ex parte Burr*, 9 Wheat. 529.

§ 2. What is ground for. An attorney can be disbarred, only on the ground of moral or professional delinquency. The doctrine has been held that the power of the court to disbar may be exercised, either for a contempt, which is an offense against the court itself, or for unfitness, which disqualifies the attorney from filling the office properly. *Austin's Case*, 5 Rawle (Penn.), 191. So, the obligation which attorneys assume when they are admitted to the bar is not discharged by merely observing the rules of courteous demeanor in open court, but also includes

the abstaining out of court from insulting language and offensive conduct toward the judges personally for their judicial acts. And a threat of personal chastisement, made by an attorney to a judge out of court for his conduct during the trial of a cause pending, is sufficient ground for striking his name from the rolls. *Bradley v. Fisher*, 13 Wall. 335. See *Jackson v. State*, 21 Tex. 668.

Where an attorney had been convicted of subornation of perjury, he was held to have been properly disbarred (*State v. Holding*, 1 McCord [S. C.], 379); and so, for a false oath or professional statement without a conviction for perjury. *Perry v. State*, 3 Iowa, 550. And see *In re Percy*, 36 N. Y. (9 Tiff.) 651. It is good cause for striking an attorney from the roll, that he accepted a challenge to fight a duel, or that he fought a duel in a sister State, and killed his antagonist (*Smith v. State*, 1 Yerg. [Tenn.] 228); or that he attempted to make an opposing attorney drunk, in order to obtain an advantage over him in the trial of a cause (*Dickens' Case*, 67 Penn. St. 169); and generally, it seems that the court may strike the name of an attorney at law from the rolls for fraudulent conduct, although it is not so gross as to be criminally punishable. *United States v. Porter*, 2 Cranch (C. C.), 60. But discreditable acts, if not infamous and not connected with an attorney's duties, will not give the court jurisdiction to strike him from the roll. *Dickens' Case*, 67 Penn. St. 169; S. C., 5 Am. Rep. 420.

Where a statute prescribes causes for which an attorney may be disbarred, the courts cannot disbar him for causes not specified in the statute. *Ex parte Smith*, 28 Ind. 47; see, also, *Redman v. State*, id. 205; *Kane v. Haywood*, 66 N. C. 1.

§ 3. Notice to attorney. Except where matters occurring in open court, in presence of the judges, constitute the grounds of its action, the power of the court to disbar should never be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defense. This is said to be a rule of natural justice, and it is as applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession, as it is when the proceeding is taken to reach his real or personal property. *Bradley v. Fisher*, 13 Wall. 335, 354. And even where the matters constituting the grounds of complaint have occurred in open court, under the personal observation of the judges, the attorney should ordinarily be heard before the

order of removal is made; for those matters may not be inconsistent with the absence of improper motives on his part, or may be susceptible of such explanation as would mitigate their offensive character, or he may be ready to make all proper reparation and apology. *Id.*; *Ex parte Robinson*, 19 *id.* 505; *Ex parte Bradley*, 7 *id.* 364; *Ex parte Heyfron*, 7 How. (Miss.) 127; *Beene v. State*, 22 Ark. 157; *People v. Turner*, 1 Cal. 148; *Fletcher v. Daingerfeld*, 20 *id.* 430; *Saxton v. Stowell*, 11 Paige, 526.

If an attorney wishes to divest himself of the burden and distinction of his office, he must apply to the court; and the court will strike his name off the roll, unless the application is made to avoid an impending censure. *Scott v. Van Alstyne*, 9 Johns. 216.

§ 4. *Decision and effect of.* The punishment of an attorney, by striking his name off the roll, is not in every case to be considered a perpetual disability. If his offense has been attended with circumstances of extenuation, and his subsequent conduct proves him deserving of its lenity, the court may order him to be re-admitted, upon a proper application made for the purpose. *Rex v. Greenwood*, 1 W. Bl. 222; *Ex parte Frost*, 1 Chit. 558, *n.* But if the name of an attorney be struck off by one court, he will not afterward be admitted in any other (*Re Smith*, 1 B. & B. 522; S. C., 4 Moore, 319); and the removal of a solicitor from his office, as solicitor of the court of chancery, deprives him of the power to practice as solicitor, attorney or counsel, in any other court. *Matter of Peterson*, 3 Paige, 510. So, when an attorney has been suspended, he will not be permitted to act for the party under a letter of attorney. *Paul v. Purcell*, 1 Browne (Penn.), 348.

§ 5. *Restoration.* *Mandamus* is the appropriate remedy to restore an attorney disbarred, where the court below has exceeded its jurisdiction in the matter. *Ex parte Robinson*, 19 Wall. 505; *Ex parte Bradley*, 7 *id.* 364. Thus, the district court has no authority to remove from office one who has been admitted as an attorney of the supreme court; and, if it does so, a *mandamus* may issue to restore the attorney to his office. *People v. Turner*, 1 Cal. 143, 188, 190; and see *People v. Justices, etc.*, 1 Johns. Cas. (N. Y.) 181. The reason given for the issuing of the writ is, that the office is of public concern, and regards the administration of justice; and because there is no other remedy. *White's Case*, 6 Mod. 18; *Leigh's Case*, 3 *id.* 335; S. C., Carthew, 189, 170.

CHAPTER XIX.

AUCTIONEERS.

TITLE I.

OF AUCTIONS AND AUCTIONEERS IN GENERAL.

ARTICLE I.

WHO MAY BE AN AUCTIONEER.

Section 1. In general. An auction is a public sale of property to the highest bidder (see *Rex v. Taylor*, McClel. 362 ; S. C., 13 Price, 336 ; *Walker v. Advocate, etc.*, 1 Dow, H. L. 111) ; and an auctioneer is one who conducts a public sale or auction, generally under the authority of a license granted to him for that purpose. *Hunt v. Philadelphia*, 35 Penn. St. 277 ; *State v. Conkling*, 19 Cal. 501 ; *Clark v. Cushman*, 5 Mas. 505 ; *State v. Rucker*, 24 Mo. 557 ; *Waterhouse v. Dorr*, 4 Me. 333. A distinction is to be observed between an auctioneer and a broker. The former can neither buy for himself nor for a third person ; nor can he sell at private sale. But the latter can both buy and sell at private sale. *Barker v. Mar. Ins. Co.*, 2 Mas. (C. C.) 369 ; *Wilkes v. Ellis*, 2 H. Bl. 555 ; and see *M' Mechen v. Mayor, etc., of Baltimore*, 3 Harr. & J. (Md.) 534 ; *ante*, 79.

§ 2. **Statutes relating to.** Primarily, an auctioneer is the agent of the seller of the goods, appointed in the same manner as other special agents. His rights and duties are to a great extent peculiar to his special business, and in many of the States these are limited by statute, and the taking out of a license is made a prerequisite to the exercise of his calling. See cases cited above. And so in England, by 8 and 9 Vict. c. 15 ; 27 and 28 Vict. c. 56, § 14. A bond is likewise sometimes required by statute, to be executed by a person desirous of doing an auction business, as a security for his private customers, as well as for the duties payable to the State. See *Davis v. Commonwealth*, 3 Watts (Penn.), 297 ; *Florence v. Richardson*, 2 La. Ann. 663 ; *Mayor, etc., of Georgetown v. Baker*, 2 Cranch (C. C.), 291 ; *City Council v. Patterson*, 2 Bailey (S. C.), 165.

A mere verbal authority is sufficient to authorize an agent to act as auctioneer and to sell lands, but not to make a deed of them. *Yourt v. Hopkins*, 24 Ill. 326.

ARTICLE II.

RIGHTS AND POWERS OF AUCTIONEERS.

Section 1. As to conditions of sale. An auctioneer has a right to prescribe the rules of bidding and the terms of sale. And the conditions of sale, printed and pasted up under the auctioneer's box, or in the auction room, where he declares that the conditions are as usual, is sufficient notice to purchasers of the conditions. *Mesnard v. Aldridge*, 3 Esp. 271. So, verbal declarations by the auctioneer at the sale are admissible against the principal and will bind him, unless they contradict the printed conditions, in which case they are not binding (*Powell v. Edmunds*, 12 East, 6; *Gunnis v. Erhart*, 1 H. Bl. 289; *Wright v. Deklyne*, Pet. [C. C.] 199); though an advertisement of a sale of property by an auctioneer may be explained at the time of sale. *Rankin v. Matthews*, 7 Ired. L. (N. C.) 286. See, also, *Boinest v. Leiznez*, 2 Rich. (S. C.) 464; *Wainwright v. Read*, 1 Desau. (S. C.) 573. And if there be any special agreement varying the written or printed conditions of sale, the parties would not, of course, be bound by them. *Bartlett v. Purnell*, 4 Ad. & El. 792; *Ex parte Gwynne*, 12 Ves. 379.

§ 2. **May receive payment.** An auctioneer employed to sell goods under the usual conditions may receive payment for them from the purchaser. *Yourt v. Hopkins*, 24 Ill. 326; *Capel v. Thornton*, L. R., 1 Q. B. 352. But he must sell for cash, and has no authority to receive a bill of exchange instead of cash (*id.*); though it would seem to be otherwise as to a check. *Thorold v. Smith*, 11 Mod. 67. Where, under the terms of the conditions of sale, the vendor is to receive the purchase-money, the auctioneer is not authorized to accept payment. *Sykes v. Giles*, 5 Mees. & W. 645, 652. But if the terms of sale provide that a portion of the purchase-money shall be paid within a given time, and the auctioneer is authorized to receive it, his authority is not revoked immediately upon the expiration of the time limited without further orders from his principal prohibiting the subsequent reception of such money. *Pinckney v. Hagadorn*, 1 Duer (N. Y.), 89.

§ 3. **No right to warrant.** There seems to be a doubt whether, in an ordinary sale of goods by auction, an auctioneer, in virtue of his office, has any right or authority to warrant goods sold by him, in the absence of any express authority from his principal to do so, and without proof of some known and established usage of trade, from which an authority can be implied. See *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 589; *Blood v. French*, 9 Gray (Mass.), 197. It is clear, however, that an auctioneer has no authority to bind an administrator personally, by a warranty of the condition of goods of the intestate (id.); and it may be accepted generally as the true doctrine that auctioneers are special agents, having authority only to sell, and not to warrant, unless specially instructed so to do. *The Monte Allegre*, 9 Wheat. 616, 647. See *Dent v. McGrath*, 3 Bush (Ky.), 174.

§ 4. **Cannot delegate his powers.** The authority committed to an auctioneer is a personal trust and confidence, which he cannot delegate to another. *Stone v. State*, 12 Mo. 400. He may, however, employ another person to use the hammer and make the outcry, under his immediate supervision and direction; and, although he is occasionally absent during the sale, the agent will not incur the penalty of selling without license. *Commonwealth v. Harnden*, 19 Pick. (Mass.) 482. He may also employ all necessary and proper clerks and servants to assist him in the sale. Id.; *ante*, 244. And see *Porce v. Bonneval*, 6 La. Ann. 386.

§ 5. **Limited to perfecting sale by auction.** An auctioneer is an agent to effect a sale, and as soon as the sale is perfected his agency ceases. If he has pursued his instructions, he is in no manner liable for the execution of the contract, and can neither add to nor take from the terms and conditions the principal has prescribed. *Boinest v. Leigne*, 2 Rich. (S. C.) 464; *Nelson v. Aldridge*, 2 Stark. N. P. 435. Although he may sell lands under a verbal authority, he cannot execute a deed of them without a written power. *Yourt v. Hopkins*, 24 Ill. 326.

§ 6. **May bring actions.** In case of personal property, an auctioneer employed to sell may ordinarily maintain an action for the price, or for the property itself. *Atkyns v. Amber*, 2 Esp. 493; *Tyler v. Freeman*, 3 Cush. (Mass.) 261. This doctrine is founded upon the right of the auctioneer to receive, and his responsibility to his principal for, the price of the property sold, and his lien thereon for his commissions, which give him

a special property in the goods intrusted to him for sale, and an interest in the proceeds. *Beller v. Black*, 19 Ark. 566; *Hulse v. Young*, 16 Johns. 1; *Minturn v. Main*, 7 N. Y. (3 Seld.) 220. As it regards real estate the case is different. The auctioneer can have no such special property in it, and would not ordinarily be held entitled to receive the price for it. But when the terms of his employment, and of the authorized sale, contemplate the payment of a deposit into his hands at the time of the auction, and before the completion of the sale by the delivery of the deed, he stands, in relation to such deposit, in the same position as he does to the price of personal property sold and delivered by him. He may receive and receipt for the deposit; his lien for commissions will attach to it; and he may sue for it in his own name whenever an action for the deposit, separate from the other purchase-money, may become necessary. *Thompson v. Kelly*, 101 Mass. 291; S. C., 3 Am. Rep. 352. See *post*, 488, art. 8, § 1.

§ 7. **Cannot sell at private sale.** In no case can an auctioneer, under his authority as such, negotiate a private sale after failure at an auction sale. *Daniel v. Adams*, Ambl. 495; *Jones v. Nanney*, 13 Price, 76; S. C., M'Clel. 25; *Seton v. Slade*, 7 Ves. 276; *Marsh v. Jelf*, 3 F. & F. 234.

§ 8. **Cannot bid or buy for another.** Ordinarily, an auctioneer cannot purchase the goods of his principal, either for himself or for a third person. Were he permitted to do so, his interest as agent would be utterly incompatible with his interest as purchaser, and would tend to promote fraudulent dealing. See *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 204; *Barker v. Mar. Ins. Co.*, 2 Mason, 369. But see *Scott v. Mann*, 36 Tex. 157; *ante*, 246.

ARTICLE III.

DUTIES AND LIABILITIES OF AUCTIONEERS.

Section 1. As to care of property. An auctioneer is bound to take due care of property sent to him for sale, the same as he would of his own goods. He assumes the responsibilities and duties of a bailee, for hire of labor and services, and must exercise ordinary diligence and skill. He is not liable for unavoidable accidents. *Maltby v. Christie*, 1 Esp. 340. An auctioneer has no right to place goods, intended for sale, in the public streets, because there is no necessity therefor; and if he does,

he is indictable for a nuisance. *Commonwealth v. Passmore*, 1 Serg. & R. (Penn.) 219.

§ 2. To obey instructions. An auctioneer is bound strictly to observe the instructions of his principal, and if he deviate from such instructions, he is liable in damages, like other agents. *Wilkinson v. Campbell*, 1 Bay (S. C.), 169; *Wolfe v. Luyster*, 1 Hall (N. Y.), 146; *Steele v. Ellmaker*, 11 Serg. & R. (Penn.) 86; *ante*, 242, 243. If the price is limited, his duty is to set the goods up at that price. If they will not sell at the price limited, he must not sell. And if the goods perish because they cannot be sold at that price, the loss must fall on the owner. *Williams v. Poor*, 3 Cranch (C. C.), 221. And see *Bush v. Cole*, 28 N. Y. (1 Tiff.) 261. In the absence of special instructions, it is the duty of the auctioneer to follow the common custom in the business. See *Johnston v. Osborne*, 11 Ad. & El. 549; *ante*, 243.

§ 3. Selling for undiscovered principal. An auctioneer, acting as the agent of another in the sale of property, is personally responsible as vendor, unless at the time of the sale he disclose the name of his principal. His general employment as auctioneer is not *per se* notice that he acts as agent. *Mills v. Hunt*, 20 Wend. 431; *Schell v. Stephens*, 50 Mo. 375; *ante*, 258, 259. So, a bidder may repudiate a purchase of goods knocked down to him, if the auctioneer refuses to disclose his principal. *Thomas v. Kerr*, 3 Bush (Ky.), 619.

§ 4. Diligence and honesty. Auctioneers assume upon themselves an obligation to their employers to perform the service confided to them, with ordinary care and skill, and they become responsible in default of either. In other words, they are responsible for loss arising from gross negligence or ignorance. Beyond this, their duties or liabilities do not extend. *Hicks v. Minturn*, 19 Wend. 550. The degree of care and skill required to be exercised by an auctioneer is such as is ordinarily possessed by men of his profession or business in the same neighborhood or place. *Ib.*; *Denew v. Daverell*, 3 Camp. 452.

§ 5. Sale of stolen goods. An auctioneer who innocently sells stolen goods, or goods as the property of one not the owner, is liable for the goods or their value to the real owner, in an action brought by the latter to recover the value. *Hoffman v. Carow*, 20 Wend. 21; S. C. affirmed, 22 id. 285; *Allen v. Brown*, 5 Mo. 323. Thus, where one hired a piano-forte, and afterward borrowed money upon it from an auctioneer, who sold it by auction and paid over the proceeds, it was held that the party from

whom it was hired could maintain trover therefor against the auctioneer. *Chambers v. McCormick*, 4 N. Y. Læg. Obs. 342. It has, however, been held, in an early case, that if an auctioneer pays to his employer the proceeds of goods sold, without notice that a third person claims property in them, he is not afterward liable to such third person, though he be the real owner of the goods. *Jacobs' Case*, 2 Bay (S. C.), 84. And although he be responsible to the real owner in such case, in the first instance, yet he has his remedy against the one who employed him to sell the goods. *Adamson v. Jarvis*, 4 Bing. 66; S. C., 12 Moore, 241. See *Murray v. Mann*, 2 Exch. 538; *Stevens v. Legh*, 24 Eng. Law & Eq. 210.

Where the persons present at an auction sale were distrustful of the title of the reputed owner of the article to be sold, and the auctioneer announced that he "knew him well, and he was all right, and that he (the auctioneer) would warrant that his title was good," it was held that this amounted to a warranty by the auctioneer, upon which an action might be sustained. *Dent v. McGrath*, 3 Bush (Ky.), 174. See *ante*, 256, 257.

§ 6. **Liable as a stakeholder.** It is not unusual for an auctioneer to be made a stakeholder; and, as such, it is his duty, where he sells an estate by public auction and receives a deposit from the purchaser, to retain the deposit until the sale is complete, and it is ascertained to whom the money belongs. *Gray v. Gutteridge*, 3 C. & P. 40. If he pay over the sum deposited to the vendor before the completion of the contract of sale, and the contract be rescinded or abandoned on account of the vendor's defect of title, he does so in his own wrong, and will be liable to the purchaser for the deposit, in an action for money had and received. *Id.*; *Edwards v. Hodding*, 5 Taunt. 815; S. C., 1 Marsh. 377; *Burrough v. Skinner*, 5 Burr. 2639. And the action may be brought to recover the deposit, without notice to the auctioneer that the contract had been rescinded by the parties. *Duncombe v. Cafe*, 2 M. & W. 244. But unless such notice has been given, or the repayment of the deposit has been demanded, interest thereon cannot be recovered. *Lee v. Munn*, 8 Taunt. 45; S. C., 1 Moore, 481; *Calton v. Bragg*, 15 East, 223. In an action for the deposit, in which the auctioneer pays the costs, he cannot afterward recover these costs from the principal, in an action for money had and received, but must declare specially. *Spurrier v. Elderton*, 5 Esp. 1.

Where a solicitor, acting for a vendor, receives the deposit on

the sale of an estate, the law will not imply, as in the case of an auctioneer, that he receives it as a stakeholder. If he professes to receive it as agent for the vendor, he is bound to pay it over to him on demand. *Edgell v. Day*, 1 H. & R. 8; S. C., L. R., 1 C. P. 80.

ARTICLE IV.

EFFECT OF PUFFING AND COMBINATIONS.

Section 1. In general. It is a fraud upon honest bidders for an owner of property offered for sale at auction, or, in the case of a judicial sale, for creditors in whose behalf the sale is made, to employ puffers or by-bidders for the purpose of increasing the price by fictitious bids; and a buyer whose bid immediately followed one made by puffer cannot be compelled to complete the contract, or he may have it set aside in equity. *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 159; *Donaldson v. McRoy*, 1 Browne (Penn.), 346; *Morehead v. Hunt*, 1 Dev. Eq. (N. C.) 65; *Moncrief v. Goldsborough*, 4 Harr. & M. (Md.) 282; *Towle v. Leavitt*, 23 N. H. 360; *Staines v. Shore*, 16 Penn. St. 200; *Pennock's Appeal*, 14 id. 446; *Green v. Baverstock*, 14 C. B. (N. S.) 204. It is his duty, however, to return the property purchased when the fraud is discovered (*McDowell v. Simms*, Busb. Eq. [N. C.] 130; *Staines v. Shore*, 16 Penn. St. 200); but if not discovered till too late to do so, his defense is good without it. Id. The employment of a puffer vitiates the sale, even though the property brought no more than its general value (id.); and especially where all the bidders except the purchaser are by-bidders, secretly employed by the seller, and the purchaser's judgment is improperly influenced by their bids. *Veazie v. Williams*, 3 Story, 611.

Combinations to prevent bidding are likewise held, both at law and equity, to be fraudulent. *Towle v. Leavitt*, 23 N. H. 360, 372; *Doolin v. Ward*, 6 Johns. 194. And agreements, whereby parties engage not to bid against each other at a public auction, are held void, as against public policy (*National Bank v. Sprague*, 20 N. J. Eq. 159; *Wooten v. Hinkle*, 20 Mo. 290; *Loyd v. Malone*, 23 Ill. 43); and no subsequent acts of the parties under such an agreement will have the effect of ratifying or confirming it, or estop the parties from asserting its invalidity. *Wheeler v. Wheeler*, 5 Lans. (N. Y.) 355. But the mere attempt of a purchaser of property at an auction to prevent another

person from bidding for it, will not render the purchase invalid ; to have this effect, the attempt must have been successful. *Haynes v. Crutchfield*, 7 Ala. 189. Nor is it unlawful for persons who wish to make a joint purchase of property about to be offered at auction, to agree together that they will authorize one person to bid for it, upon their joint account. *National Bank v. Sprague*, 20 N. J. Eq. 159. Though it is otherwise as to an agreement between two bidders for a public contract, that, if the contract should be awarded to either, both should share equally in the profits, if any, and contribute equally to the losses. Such an agreement is void. *Atcheson v. Mallon*, 43 N. Y. (4 Hand) 147 ; S. C., 3 Am. Rep. 678. And see *Loyd v. Malone*, 23 Ill. 43 ; *Worton v. Hinkle*, 20 Mo. 290. So, an agreement to pay a mail contractor for repudiating his contract is void. *Weld v. Lancaster*, 56 Me. 453. And see *Sharp v. Wright*, 35 Barb. 236.

Where one bids for another at an auction, but does not at the time, nor on the day of sale, disclose the name of his principal to the owner or auctioneer, he is liable as purchaser (*McComb v. Wright*, 4 Johns. Ch. 659) ; and if one stands by and permits his name to be put down as purchaser, by the direction of the bidder, he will be bound as purchaser, though the bidding was without his authority. *Jenkins v. Hogg*, 2 Mill. Const. (S. C.) 821.

§ 2. *Illusory bids, when allowed.* The general rule, that the employment of puffers, or by-bidders, will avoid an auction sale, has its exceptions. Thus, the sale will not be set aside where the purchaser, after knowledge of the facts, took possession and allowed a confirmation of the sale. *Backenstoss v. Stahler*, 33 Penn. St. 251. So, the sale will be permitted to stand, where the price was not exorbitant, and there had been a long acquiescence by the purchaser. *Latham v. Morrow*, 6 B. Monr. (Ky.) 630. And if persons be employed to bid up to a certain sum, in order to avoid a sacrifice of the property, and the price is afterward raised by real bidders, the sale will be valid. *Steele v. Ellmaker*, 11 Serg. & R. (Penn.) 86 ; *Veazie v. Williams*, 3 Story, 620 ; *Bramley v. Alt*, 6 Ves. 619. It has likewise been held that to employ a person to "bid in" for the owner, does not necessarily vitiate an auction sale, if the price is not intended to be thereby enhanced beyond a fair value. And whether the by-bidder is employed in good faith to prevent a sacrifice, or simply to enhance the price by a pretended competition, is a question for the jury. *Reynolds v. Dechaums*, 24

Tex. 174. See, also, *Fox v. Wright*, 6 Madd. 111; *Ord v. Noel*, 5 id. 440. If there be danger that the property may be sacrificed for the want of bidders, the owner is at liberty to withdraw it before the sale commences, or he may set it up at a specified sum, or he may announce that he reserves the right to make one bid himself. See *Towle v. Leavitt*, 23 N. H. 380. And where an auction is announced as intended to be "without reserve," the employment by the vendor of a puffer to bid for him, renders the sale voidable, and entitles the purchaser to recover back his deposit from the auctioneer. *Thornett v. Haines*, 15 Mees. & W. 367; *Meadows v. Tanner*, 5 Madd. 37. See *Dimmick v. Hallett*, L. R., 2 Ch. App. 31; *Gilliat v. Gilliat*, L. R., 9 Eq. 60. To place goods in the hands of an auctioneer, with directions that he shall not part with or dispose of them, unless they produce a specified sum, is not regarded as an unlawful means of enhancing the price, nor an imposition on fair purchasers (*Wolfe v. Luyster*, 1 Hall [N. Y.], 146; *Hazul v. Dunham*, id. 655; *Towle v. Leavitt*, 23 N. H. 380; *Steele v. Ellmaker*, 11 Serg. & R. [Penn.] 86); and an action will lie against the auctioneer for a breach of such directions. *Ib.* It has been held not fraudulent for a debtor to employ a person to buy in his property at sheriff's sale, merely to prevent a sacrifice. *Lee v. Lee*, 19 Mo. 420. So, an agreement by an administrator or guardian to offer the real estate of his intestate, or ward, for sale by auction, and to sell the same to a particular individual for an agreed price, provided no higher sum should be bid, is valid. But such an agreement to sell the estate at a fixed price, without regard to the biddings, is fraudulent and void. *Hunt v. Frost*, 4 Cush. (Mass.) 54.

In the English courts of equity the presence of one puffer was allowed, even in sales "without reserve," in order to prevent a sacrifice of property. See *Green v. Baverstock*, 14 C. B. (N. S.) 204; *Mortimer v. Bell*, L. R., 1 Ch. App. 10. But the rule at common law is clearly stated to be that, upon a sale by auction where the highest bidder is to be the purchaser, the secret employment of a puffer by the vendor is a fraudulent act. The sale is vitiated by the fraud and void, unless the vendee, with knowledge of the fact, has acted upon it so as to deprive himself of the right to complain. *Green v. Baverstock*, 14 C. B. (N. S.) 204; *Warlow v. Harrison*, 1 El. & El. 295; *Crowder v. Austin*, 3 Bing. 368. And now by statute 30 and 31 Vict., c. 48, it is provided that, "whenever a sale by auction of land would be invalid

at law by reason of the employment of a puffer, the same shall be deemed invalid in equity, as well as at law." See *Gilliat v. Gilliat*, L. R., 9 Eq. 59. That a sale at auction, under process of law, cannot be invalidated for mere inadequacy of price, see *Den v. Zeller*, 7 N. J. L. (2 Halst.) 153; *Livingston v. Byrne*, 11 Johns. 555.

ARTICLE V.

SALE, WHEN BINDING.

Section 1. In general. Every bidding at an auction is nothing more than an offer on one side, which is not binding on either side till it is assented to. This assent on the part of the seller is generally signified by knocking down the hammer (*Payne v. Cave*, 3 T. R. 148); though any other mode would be equally binding. Until the hammer falls, the bidder is entitled to the *locus penitentiae*; or, in other words, may retract his bid. *Ib*; *Warlow v. Harrison*, 1 El. & El. 295. And it has been held that a bid may be retracted or withdrawn by implication. Thus, if the auctioneer adjourns the sale of the particular article, and passes to something else, without the express assent of the bidder, this is a tantamount to a rejection of the preceding bid, which is thereby annulled. *Donaldson v. Kerr*, 6 Penn. St. 486. See *Jones v. Nanney*, 6 Eng. Exch. (13 Price) 22.

ARTICLE VI.

EFFECT OF STATUTE OF FRAUDS.

Section 1. Auctioneer agent of both parties. Until the hammer goes down, the auctioneer is exclusively the agent of the vendor. *Warlow v. Harrison*, 1 El. & El. 295. But it is now settled that a sale at auction is within the provisions of the statute of frauds, and requires a memorandum in writing to render it binding. *Walker v. Constable*, 1 Bos. & Pul. 306; *Hinde v. Whitehouse*, 7 East, 558; *Brent v. Green*, 6 Leigh (Va.), 16; *Burke v. Haley*, 7 Ill. (2 Gilm.) 614. This memorandum of the sale and its terms, duly made, and signed by the auctioneer, is sufficient as a memorandum under the statute of frauds, to bind both parties to the contract. And for this purpose the auctioneer is to be considered the agent of the purchaser, as well as that of the vendor. *McComb v. Wright*, 4 Johns. Ch. 659; *Morton v. Dean*, 13 Metc. (Mass.) 385; *Pike v. Balch*, 38 Me. 302;

Bird v. Boulter, 4 B. & Ad. 446; *Gill v. Hewett*, 7 Bush (Ky.), 10; *Walker v. Herring*, 21 Gratt. (Va.) 678. Though it is held that he cannot bind the purchaser, unless the memorandum be made on the day of the sale (*Mews v. Carr*, 1 H. & N. 484; *Horton v. McCarty*, 53 Me. 394); and whether he be the agent of both parties will depend upon the facts of the particular case. *Bartlett v. Punnell*, 4 Ad. & El. 792. The entry of the buyer's name by the auctioneer's clerk, if made in the presence of the auctioneer and of the buyer, is a sufficient signing within the statute of frauds (*Alna v. Plummer*, 4 Me. 258; *Pope v. Chafee*, 14 Rich. Eq. (S. C.) 69; *Johnson v. Buck*, 35 N. J. L. 338; *Bird v. Boulter*, 4 B. & Ald. 443; *Harvey v. Stevens*, 43 Vt. 653); and so of the entry of a commissioner conducting a sale by direction of a court of equity; he being regarded as agent of both parties. *Jenkins v. Hogg*, 2 Mill. Const. (S. C.) 281. But if the auctioneer is himself the vendor and party in interest, he cannot bind his purchaser by a memorandum of the sale executed by himself. *Bent v. Cobb*, 9 Gray (Mass.), 397; *Tull v. David*, 45 Mo. 444.

§ 2. **Form of memorandum of sale.** A general memorandum entered in a book by the auctioneer at the commencement of an auction sale, showing the name of the person on whose account the sale is made, the nature of the property, the terms of payment, referring to entries following for the names of purchasers and lots struck off to each, and signed by the auctioneer, or by his clerk, under which he enters the name of each purchaser, the description of the goods sold, and the price, is a sufficient memorandum of each sale within the statute of frauds. *Price v. Durin*, 56 Barb. 647. Nor is it necessary that such general memorandum should be made as often as a parcel of goods is sold; even though the sale is adjourned to and continues on the second day without any repetition of the memorandum. *Id.* And see *Hart v. Woods*, 7 Blackf. (Ind.) 568; *Cherry v. Long*, Phill. L. (N. C.) 466; *Cathcart v. Keirnaghan*, 5 Strobh. (S. C.) 129; *Pope v. Chafee*, 14 Rich. Eq. (S. C.) 69. And to satisfy the statute, it is sufficient that the terms of the bargain may be gathered from two or more separate papers, if the signed memorandum contains such reference to the other papers as to make the latter part of the former; but the connection between the signed and unsigned papers cannot be made by parol evidence that they were intended by the parties to be read together, or of facts and circumstances from which such intention may be

inferred. *Johnson v. Buck*, 35 N. J. L. 338; *Morton v. Dean*, 13 Metc. (Mass.) 385; *Horton v. McCarty*, 53 Me. 394. To bind a purchaser of real estate sold at auction, a memorandum, containing all the essential terms of the contract, must be made and signed by the auctioneer at the time of the sale and before the termination of the proceedings. *Id.*; *Smith v. Arnold*, 5 Mason, 414; *Mews v. Carr*, 38 Eng. L. & Eq. 358. But where the auctioneer makes a memorandum in pencil at the time of sale, which is, as early as practicable, entered upon his books, the latter is regarded as the original entry. *Episcopal Church v. Wiley*, Riley's Ch. (S. C.) 156; S. C., 2 Hill, 583.

ARTICLE VII.

COMPENSATION OF AUCTIONEER.

Section 1. In general. As the agent of the vendor, the auctioneer has a claim for compensation, usually in the form of a commission, which, in the absence of any special agreement, is determined by common usage. *Robinson v. New York Ins. Co.*, 2 Caines, 357; *Russell v. Miner*, 61 Barb. 534; S. C., 5 Lans. 537; *Clark v. Smythies*, 2 F. & F. 83; *Bower v. Jones*, 8 Bing. 65. He is also entitled to be reimbursed for expenses and advances (*Rogers v. Kneeland*, 10 Wend. 218; *Girardey v. Stone*, 24 La. Ann. 286; *Russell v. Miner*, 61 Barb. 534; S. C., 5 Lans. 537; *Powell v. Trustees of Newburgh*, 19 Johns. 284), and also for damages arising out of the agency; provided his conduct is blameless in relation thereto. *Allaire v. Ouland*, 2 Johns. Cas. (N. Y.) 54; *Capp v. Topham*, 6 East, 392; *Covenry v. Barton*, 17 Johns. 142. See *Leeds v. Bowen*, 1 Rob. (N. Y.) 10.

An auctioneer employed to sell property at a certain commission or so much as he shall sell is not entitled to the commission on a bid not complied with. *Cochrane v. Johnson*, 2 McCord (S. C.), 21; *Girardey v. Stone*, 24 La. Ann. 286.

§ 2. **Loss by negligence or fraud.** Where an auctioneer, employed to sell goods or an estate, is guilty of negligence or fraud, whereby the sale becomes nugatory, he is not entitled to recover any compensation for his services from the vendor. *Denew v. Daverell*, 3 Camp. 451; and see *Brown v. Staton*, 2 Chit. 353; *Mainprice v. Westley*, 6 B. & S. 420.

§ 3. **Lien.** An auctioneer has a special property in the goods in his hands for sale (*Beller v. Block*, 19 Ark. 566), and a lien

thereon, and on the proceeds of sale, for charges of sale, commissions and auction duty. *Hulse v. Young*, 16 Johns. 1; *Williams v. Millington*, 1 H. Bl. 81. But this lien may be lost by a delivery of the goods before the price is paid. *Blinn v. Torre*, Riley's L. (S. C.), 153.

ARTICLE VIII.

ACTIONS FOUNDED UPON AUCTION SALE.

Section 1. Auctioneer may sue. See *ante*, 478, art. 2, § 6. He may personally sue his principal for damages or expenses, or for his commission; and he may sue the purchaser in his own name for the price of goods sold by him, whereon he holds a lien for his charges. *Hulse v. Young*, 16 Johns. 1; *Robinson v. Rutter*, 4 El. & B. 954; *Flanigan v. Crull*, 53 Ill. 352. But this authority to sue, in the latter case, is subject to the right of the principal to take the collection into his own hands, and sue in his own name. *Girard v. Tuggart*, 5 Serg. & R. (Penn.) 19. And where the conditions of an auction sale expressly stipulate that an auctioneer's fees, of a special sum, shall be paid to the auctioneer on the day of sale, he may sue the purchaser in his own name to recover such sum; but his right to recover will depend on the validity of the contract to purchase, as between buyer and seller. *Johnson v. Buck*, 35 N. J. L. 338. And the purchaser may set off, in an action against him by the auctioneer, a debt due by the owner to him. *Blinn v. Torre*, Riley's L. (S. C.), 153.

In an action against an auctioneer upon a contract of sale, where the defense is that the contract was by parol, and so void under the statute of frauds, the fact that the law imposes upon auctioneers the duty of making memoranda of sales made by them, and the presumptions in favor of the performance of official duty cannot stand for proof that there was a written contract of sale. *Baltzen v. Nicolay*, 53 N. Y. (8 Sick.) 467.

§ 2. Vendor liable for auctioneer's statements. The verbal declarations of an auctioneer at the time of the sale are admissible as evidence against the principal, and will bind him; unless they contradict the printed conditions of sale, in which case they are not binding. *Gunnis v. Erhart*, 1 H. Bl. 289; *Powell v. Edmunds*, 12 East, 6. See *ante*, 477, 478, art. 2, §§ 1, 3.

CHAPTER XX.

AUDITA QUERELA.

ARTICLE I.

NATURE OF THE REMEDY.

Section 1. In general. The proceeding by *audita querela* is said to have commenced about the tenth year of Edward III. See *Young v. Collet*, T. Raym. 89; S. C., 2 Saund. 148, *b.*; and in *Sutton v. Bishop*, 4 Burr. 2283, 2286, the court speaks of it as an "old legal remedy, long disused and expensive"; and the instances of its use in modern times are comparatively rare. It is, however, neither an obsolete nor difficult proceeding. *Baker v. Ridgway*, 2 Bing. 41, 47.

An *audita querela* is a writ to be delivered against an unjust judgment or execution, by setting them aside for some injustice of the party that obtained them, which could not be pleaded in bar to the action. Bac. Abr., tit. Audita Querela; 2 Broom & Had. Com. (Wait's ed.) 270. It is a remedial process, which bears solely on the wrongful acts of the opposite party, and not upon the erroneous judgments or acts of the court. *Lovejoy v. Webber*, 10 Mass. 101; *Brackett v. Winslow*, 17 id. 159; *Little v. Cook*, 1 Aik. (Vt.) 363. It is a proceeding of common right, and *ex debito justitiæ*, and need not be moved for. *Nathan v. Giles*, 5 Taunt. 558; S. C., 1 Marsh. 226. But see *Waddington v. Vredenberg*, 2 Johns. Cas. (N. Y.) 227. The writ, though authorized by statute in some cases, is derived from the common law, and is governed by the rules of the common law as to misjoinder, and parties and causes of action, and as to its proceedings, mode of trial, and the rendition and effect of final judgment. *Johnson v. Plimpton*, 30 Vt. 420; *Brackett v. Winslow*, 17 Mass. 153; and see *Poultney v. Treasurer of State*, 25 id. 168. It is directed to the court in which the judgment was rendered, and where the record remains. Id.

§ 2. Where it will lie. It has been said that the remedy by *audita querela* did not lie where there was any other remedy at law, either by plea or otherwise. *Young v. Collet*, T. Raym. 89; S. C., 2 Saund. 148, *b.* But it has been held in a number of

American cases that, by the common law, the writ lies, although another remedy may exist. Thus, if one be taken in execution after the judgment has been satisfied, *audita querela* is a proper remedy, though trespass would lie against the creditor; and so, if after commitment he pay the judgment, and still be detained by order of the creditor, though he might be relieved by *habeas corpus*. *Brackett v. Winslow*, 17 Mass. 158. And see *Lovejoy v. Webber*, 10 id. 101; *Folan v. Folan*, 59 Me. 566, 568; *Sawyer v. Vilas*, 19 Vt. 43. In order to maintain the action, the party must have been injured, or be in danger of injury. *Bryant v. Johnson*, 24 Me. 304. It lies generally for any matters which work a discharge occurring after judgment entered; as where a party obtains a discharge under the insolvent act, after the judgment. *Petit v. Seaman*, 2 Root (Conn.), 178; *Baker v. Judges, etc.*, 4 Johns. 191; *Commonwealth v. Whitney*, 10 Pick. (Mass.) 439; see, also, *Parker v. Jones*, 5 Jones' Eq. (N. C.) 276. And for matters occurring before judgment, which the defendant could not plead through want of notice, or through collusion or fraud of the plaintiff. *Wardell v. Eden*, 2 Johns. Cas. (N. Y.) 258; *Johnson v. Harvey*, 4 Mass. 485; *Smock v. Dade*, 5 Rand. (Va.) 639; *Dingman v. Myers*, 13 Gray (Mass.), 2; *Folan v. Folan*, 59 Me. 566. It is the proper remedy to set aside a judgment from which an appeal was improperly refused (*Edwards v. Osgood*, 33 Vt. 224); or to obtain relief from an execution issued for too large an amount by a mistake of the clerk (*Stone v. Chamberlain*, 7 Gray [Mass.], 206); or to set aside a levy of execution on real estate when the officer has made a false return of the appraisal. *Hopkins v. Hayward*, 34 Vt. 474. It is also the proper remedy for one whose lands are jointly liable with those of others, for the purpose of obtaining contribution, and to satisfy the judgment (*Wilson v. Watson*, Pet. [C. C.] 269); and where two suits are brought at the same time, for the same cause of action, and proceed, *pari passu*, to judgment and execution, a satisfaction of either judgment may be shown upon *audita querela*, in discharge of the other. *Bowne v. Joy*, 9 Johns. 221. Where more costs were allowed by a justice of the peace than were warranted by statute, his judgment and execution were set aside by this writ (*Weed v. Nutting*, Brayt. [Vt.] 28); and so, where judgment was rendered by a justice of the peace against an infant who did not defend by guardian. *Judd v. Downing*, id. 27; see, also, *Lincoln v. Flint*, 18 Vt. 247. The writ will also lie to set aside an execution wrongfully issued

against the body of the execution debtor (*Sawyer v. Vilas*, 19 id. 43); or to vacate a judgment rendered by a justice of the peace in an action of slander (*Ball v. Sleeper*, 23 id. 573); and where a judgment of a justice of the peace had been obtained without notice, the defendant being out of the State at the time of commencing the suit, and the plaintiff did not comply with the requisitions of the justices' act, relief was obtained by this writ. *Marvin v. Wilkins*, 1 Aik. (Vt.) 107; and see *Eastman v. Waterman*, 26 Vt. 494; *Dingman v. Myers*, 13 Gray (Mass.), 1.

§ 3. When it does not lie. The writ of *audita querela* being a remedial process, "for some injustice of the party," does not lie upon erroneous acts of the court (*Lovejoy v. Webber*, 10 Mass. 101; *Little v. Cook*, 1 Aik. [Vt.] 363; *Brackett v. Winslow*, 17 Mass. 159); nor for any matter which might have been, or which may be, taken advantage of by a writ of error. *Weeks v. Lawrence*, 1 Vt. 433; and see *Amidon v. Aikin*, 28 id. 440; *School District v. Rood*, 27 id. 214. So, it is a settled principle, that where a party has had a legal opportunity of defense, or the injury of which he complains is to be attributed to his own neglect, he cannot be relieved by an *audita querela*. *Staniford v. Barry*, 1 Aik. (Vt.) 321; *Faxon v. Baxter*, 11 Cush. (Mass.) 35; *White v. Clapp*, 8 Allen (Mass.), 283; *Griswold v. Rutland*, 23 Vt. 324.

The writ does not lie to correct an erroneous taxation of costs (*Clough v. Brown*, 38 Vt. 179; *Goodrich v. Willard*, 11 Gray [Mass.], 386); nor to set aside an execution issued in pursuance of a decree of the court of chancery (*Garfield v. University of Vermont*, 10 Vt. 536); nor to prevent the enforcement of a judgment for nominal damages and costs, made after an arbitration *in pais* wherein the award did not purport to dispose of the pending suit. *Merritt v. Marshall*, 100 Mass. 244. So, it has been held that a judgment debtor, who is arrested on execution, and voluntarily permitted by the officer to escape, and is afterward arrested by the officer, and committed to jail on the same execution, cannot maintain a writ of *audita querela* against the officer to recover damages for the false imprisonment. *Coffin v. Ewer*, 5 Metc. (Mass.) 228. And a feoffee, or purchaser of lands, or part of lands subject to a judgment, cannot have an *audita querela, quia timet*, against the lands, or that part of them of which he is feoffee or purchaser. *Waddington v. Vredenberg*, 2 Johns. Cas. (N. Y.) 227.

§ 4. Procedure, etc. The proceeding by *audita querela* is a regular suit, with its usual incidents, issues of law and fact, trial, judgment and error (*Brooks v. Hunt*, 17 Johns. 484, 486), and in which damages may be recovered if execution was issued improperly. Brooke's Abr., *Damages*, 38. So, it is said to be in the nature of an equitable suit, in which the equitable rights of the parties will be regarded. *Lovejoy v. Webber*, 10 Mass. 103; *Waddington v. Vredenberg*, 2 Johns. Cas. (N. Y.) 227.

The writ must be allowed on motion in open court (*Waddington v. Vredenberg*, 2 Johns. Cas. [N. Y.] 227); but see *Nathan v. Giles*, 5 Taunt. 558; S. C., 1 Marsh. 226. It is not, however, of itself, a stay of execution, but may become so by the order of the court (*Waddington v. Vredenberg*, 2 Johns. Cas. [N. Y.] 227); for which purpose the court will look into the grounds on which it is issued; and if they be such as would not probably entitle the defendant to the relief he seeks, although they will not refuse the *audita querela*, they will not permit it to operate as a *supersedeas* to, or stay the proceedings on the execution during its pendency. *White v. Clapp*, 8 Allen (Mass.), 283; *Hunt v. Brooks*, 18 Johns. 5; *Turner v. Davies*, 2 Saund. 148, *e*, note. *Audita querela* may be brought in the same court in which the record upon which it is founded remains, or returnable in the same court. *Id.* In this writ, like a *scire facias*, the whole of the case is spread out, answering the purpose of a declaration. A declaration may, however, be filed, and it should recite the whole record of the recovery, and show a sufficient *gravamen*, or cause of complaint. *Oakes v. School District*, 33 Vt. 156. The proper plea is, not guilty. *Lovejoy v. Webber*, 10 Mass. 103; *Little v. Cook*, 1 Aik. (Vt.) 363; *Eddy v. Cochrane*, *id.* 359.

All the parties aggrieved are entitled to the writ, and the parties to the judgment and execution sought to be vacated, or their legal representatives, must be made parties to such writ. *Gleason v. Peck*, 12 Vt. 56; *Herrick v. Orange County Bank*, 27 *id.* 534; *Melton v. Howard*, 8 Miss. (7 How.) 103. And if a judgment against several persons is vacated as to one, upon *audita querela*, it must be vacated as to all. *Starbird v. Moore*, 21 Vt. 529.

§ 5. Relief upon motion. The indulgence which, in modern times, has been shown by courts of law in granting a summary relief upon motion in most cases of evident oppression, for which the only remedy formerly was by *audita querela*, has occasioned the latter remedy to be seldom resorted to; the remedy by motion

being "more summary, easy and less expensive." See *Young v. Collett*, T. Raym. 89; *Baker v. Judges, etc.*, 4 Johns. 191; *McDonald v. Falvey*, 18 Wis. 571; *Chambers v. Neal*, 13 B. Monr. (Ky.) 256; *Huston v. Ditto*, 20 Md. 305; *Kendall v. Hodgins*, 7 Abb. (N. Y.) 309; S. C., 1 Bosw. 659. In some of the States, as Virginia, *Smock v. Dade*, 5 Rand. 639; South Carolina, *Longworth v. Screven*, 2 Hill, 298, and Tennessee, *Marsh v. Haywood*, 6 Humph. (Tenn.) 210, the summary remedy, by motion, has wholly superseded the ancient remedy. In Massachusetts and Vermont the remedy by *audita querela* is regulated by statute. *Brackett v. Winslow*, 17 Mass. 159; *Stanisford v. Barry*, 1 Aik. (Vt.) 321; *Johnson v. Plimpton*, 30 Vt. 420; *Essex Mining Company v. Bullard*, 43 id. 238. As to the remedy in Pennsylvania, see *Witherow v. Keller*, 11 Serg. & R. 274; *Commonwealth v. Berger*, 8 Phil. (Pa.) 237; Michigan, see *Hicks v. Murphy*, Walk. (Mich.) 66.

CHAPTER XXI.

BAILMENTS.

TITLE I

OF BAILMENTS GENERALLY.

ARTICLE I.

NATURE AND DEFINITION.

Section 1. In general. In commercial States or communities the law of bailments must always hold a prominent place, since there is a constant practice of borrowing, lending, hiring or keeping of chattels, or carrying or working upon them for another. All such acts are included in the term "bailment," which is derived from the French word *bailler*, to deliver.

Whatever is delivered by the owner to any other person, for any of the purposes above mentioned, is bailed to him, and the law which determines the rights and duties of the parties in relation to the property and to each other, is the law of bailments. A *bailor* is the party who delivers chattels to another for some purpose, and upon a contract express or implied. A *bailee* is a party to whom chattels are delivered for some purpose, and upon a contract express or implied. A bailee is always responsible for the property delivered to him; but the degree and measure of his responsibility are to be determined by the nature of the contract, and the law applicable to the agreement made; or, if no express agreement is made, then to such as is implied by law, from the circumstances of the case.

When the various classes of bailments are considered, it is evident that there may be very different obligations on the part of the bailee, either as to the nature or the extent of his responsibility. If he enters into an express contract his liability may be greater or less than that which would be implied by the law in the absence of an express agreement. But, in most of the cases in which legal questions arise, there is no express agreement upon the subject; and the only point for consideration is what are the rights of the parties under the circumstances of the particular case.

ARTICLE III.

OF THE VARIOUS KINDS OF BAILMENTS.

Section 1. In general. Bailments are usually distributed into three general classes or kinds. The first is where the trust or bailment is for the exclusive benefit of the bailor. The second is where the trust or bailment is for the exclusive benefit of the bailee. The third is where the trust or bailment is for the benefit of both parties. In this general division of the subject the first embraces deposits and mandates; the second gratuitous loans for use; and the third pledges or pawns, and hiring and letting to hire.

1. A **DEPOSIT** is a simple or naked deposit, or delivery of chattels to a bailee, to be kept for the bailor without any recompense, and to be returned whenever the bailor requires it.

2. A **MANDATE** is a bailment of chattels, by which the mandatory or bailee receives them, and agrees to do some act about them, or to carry them without any reward.

3. A **LOAN FOR USE** or **COMMODATUM** is a loan of chattels to the bailee, to be used by him temporarily, or for a certain time, without any return or compensation for such use; and it requires the return of the identical chattel lent.

4. A **PLEDGE** or **PAWN** is a bailment of goods or chattels to a creditor as a security for some debt or engagement.

5. A **HIRING**, which is a bailment always for a reward or compensation. This species of bailment may be subdivided into the following: 1. The hiring of a thing for use. 2. The hiring of labor, care and skill. 3. The hiring of care and services to be performed or bestowed on the thing delivered. 4. The hiring of the carriage of goods from one place to another.

These various subjects will be fully treated of in a subsequent part of this work, under the proper alphabetical arrangement of titles. See Deposit, Mandate, Loan for Use, Pledge, Hiring, Carriers, Inn-keepers, etc.

There are some general principles that are equally applicable in all cases of bailment, and they will, therefore, be discussed briefly in this preliminary and general chapter relating to the subject.

§ 2. **General rules relating to bailments.** Bailments, like other contracts, are governed by the general principles of law relating to contracts. And one of the most familiar rules is, that no contract can be enforced unless founded upon a sufficient legal

consideration. *Ante*, 70, 90. If, therefore, one person promises another that he will take his chattels and keep them without reward, or that he will do some act about them, or that he will carry them from one specified place to another, without any compensation, he will not incur any legal liability by an utter refusal to keep any of these promises. A perfect answer to any action would be an entire want of consideration for the promise.

On the other hand, if such a promise is made, without consideration, and the party undertakes the performance of his promise, he may incur a liability by his misfeasance in improperly doing the thing undertaken, if his misfeasance caused an injury to the other party. *Coggs v. Bernard*, *Ld. Raym.* 909; *S. C.*, 2 *Smith's Lead. Cas.* 369 (287), 454 (342), where the English and American cases are collected.

§ 3. **What care and diligence is required.** The practical question which so frequently arises is, what degree of care is a bailee bound to take of the property bailed to him? This question cannot be determined with entire precision; though the law recognizes three kinds or degrees of care as standards. First, there is slight care, which is that degree of care that every man of common sense, though very absent and inattentive, applies to his own affairs. Secondly, there is ordinary care, or that degree of care which every person of common and ordinary prudence takes of his own concerns; and third, there is great care, which is that degree of care that a man remarkably exact and thoughtful gives to the securing of his own property. There are infinite shades of care or diligence, from the slightest momentary thought to the most vigilant anxiety; but such extremes cannot be practically applied in the ordinary course of legal investigations. Like the three degrees just mentioned, there may be diligence in a high degree, of a common degree, and of a slight degree. Such general rules may be safely applied by a jury, so as to secure the just rights of the litigant parties.

§ 4. **Effect of custom or usage.** In determining what constitutes negligence on the part of a bailee, it is important to consider the time, place and circumstances of the transaction. Any particular act might be negligence if done at one place, while it would be entirely proper at another. Less care is taken in securing houses, barns and other out-buildings in quiet, sparsely-settled situations, than is deemed prudent in large towns or cities. In the country a man might turn his friend's horse out in the pasture, or leave him in an unlocked barn, without being

regarded as wanting in care and diligence. Of course, if thieves and burglars were known to be engaged in their nefarious practices in the neighborhood, a different rule would be proper.

The customs of trade and the course of business are to be considered. And if, in the course of a particular trade, some kinds of goods, such as coals, are usually left on a wharf without any guard or protection during the night, and they are stolen, the wharfinger, or other person having the custody, might not be responsible for the loss, although for a like loss of other goods, of a different character, he might be responsible.

§ 5. *Of the kinds and degrees of negligence.* That degree of care which the law requires, measures the degree of negligence which makes the bailee responsible for the loss of the thing bailed, or for an injury done to it. There are three degrees of care, and three corresponding degrees of negligence. The absence of slight care constitutes gross negligence; the absence of ordinary care constitutes ordinary negligence; and the absence of great care constitutes slight negligence. Whenever a thing bailed has been injured or lost, the law relating to bailments determines what degree of care the bailee was bound to exercise, and of what degree of negligence, if any, he has been guilty. Where the bailment is for the exclusive benefit of the bailor, but slight care is required of the bailee, and he is not responsible except for gross negligence. Where the bailment is for the exclusive benefit of the bailee, the greatest care is required of the bailee, and he is responsible for slight negligence. Where the bailment is for the benefit of both bailor and bailee, ordinary care is required of the bailee, and he is responsible for ordinary negligence.

§ 6. *Fraud by bailee.* The general rules of law which hold parties responsible for their frauds, and which prevent them taking any advantage of their frauds, is as applicable to bailments as to other contracts or business transactions.

So far is this rule carried that it has been frequently decided that a bailee could not avoid the consequences of his frauds, even by an express contract exempting him from such liability. Such a contract is void, because against public policy and common honesty. See *Carriers, Illegality, Fraud*.

There are several other general rules relating to bailments which might be here discussed, but since they will be presented in connection with each division of the subject, they will be there considered.

CHAPTER XXII.

BANKS AND BANKING.

TITLE I.

OF THE RIGHTS, POWERS, DUTIES AND LIABILITIES OF
BANKS AND BANKERS.

ARTICLE I.

GENERAL PRINCIPLES RELATING TO BANKS AND BANKERS.

Section 1. Nature of their dealings in general. A banker is a dealer in capital, an intermediate party between the borrower and lender. He borrows of one party and lends to another, and the difference between the terms at which he borrows and lends is the source and measure of his profits. See 1 McCulloch's Com. Dic. 86-117; *Curtis v. Leavitt*, 15 N. Y. (1 Smith) 9, 167. The principal attributes of a bank are said to be the right to issue negotiable notes, discount notes, and receive deposits. *People v. Utica Ins. Co.*, 15 Johns. 358, 390. Banks, in the commercial sense, are of three kinds: 1. Of deposit; 2, of discount; 3, of circulation. All, or any two, of these functions may be, and frequently are, exercised by the same association; but there are still banks of deposit, without authority to make discounts or issue a circulating medium. Thus, the receiving of deposits by a chartered company, and loaning or investing the same for the benefit of depositors, is a business of banking. *Bank for Savings v. The Collector*, 3 Wall. 495.

A bank is not bound to receive on deposit or to keep the funds of every man who offers money for that purpose. It may select its dealers, and refuse such as it pleases; and for the purposes of this selection the cashier appears to be the proper officer. The bank pays for its dealers who have funds to their credit, such bills and notes, accepted or drawn by them, as are payable at the bank. The latter circumstance is deemed an order of the depositor for the payment of the bill or note out of his funds deposited. But it is only in respect of its dealers, persons keeping an account with the bank, that this course of

business exists or can exist. *Thatcher v. Bank of State of New York*, 5 Sandf. (N. Y.) 121. See *Barnes v. Ontario Bank*, 19 N. Y. (5 Smith) 152; *Foster v. Essex Bank*, 17 Mass. 497.

It is the general rule that a bank is bound by the same obligations, moral and legal, when the rights of third parties are concerned, that apply to the case of an individual, unless explicitly exempted by law. *Lowry v. Commercial, etc., Bank*, Taney, 312.

§ 2. Effect of usage upon the contracts and dealings with banks.

It is a well-settled principle in the law relating to banks and banking, that reasonable and established usages and customs of banks enter into and constitute a part of contracts made with them, and must have due weight in expounding such contracts.

Warren Bank v. Suffolk Bank, 10 Cush. (Mass.) 582; *Curtis v. Leavitt*, 15 N. Y. (1 Smith) 9, 168; *Hartford Bank v. Stedman*, 3 Conn. 489; *Bank of Columbia v. Magruder*, 6 Harr. & J. (Md.) 180. But a knowledge, express or implied, of a banking usage or custom, must be brought home to the party who is to be affected by it. *Mills v. Bank of United States*, 11 Wheat. 431; *Bank of Alexandria v. Deneale*, 2 Cranch (C. C.), 488; *Pierce v. Butler*, 14 Mass. 303. And it would seem that a usage, in order to bind, must be a usage of all the banks of the place, rather than that of a particular bank. *Adams v. Otterback*, 15 How. (U. S.) 545. See *Marine Bank of Chicago v. Rushmore*, 28 Ill. 463. So, a single case is not sufficient to establish a general usage of a bank. *Duvall v. Farmers' Bank*, 9 Gill & J. (Md.) 31; see *ante*, 127-130.

A custom of banks not to correct mistakes in the receipt or payment of money, unless discovered before the person leaves the room, is illegal and void. *Gallatin v. Bradford*, 1 Bibb (Ky.), 209. And a custom of a bank to pay only half of a half bank note is bad. *Allen v. State Bank*, 1 Dev. & Bat. L. (N. C.) 3. So, the rule and practice of a bank to take notes signed by the promisors, without any distinction indicating thereon who is principal and who surety, is not alone sufficient to enable it to hold a surety, known by it to be such, after it has extended the time of payment beyond that specified in such note, without the consent of the surety, even if the surety had knowledge of such usage and practice. *Lime Rock Bank v. Mallett*, 42 Me. 349. But a custom to make demand of the maker of a note lodged in a bank, without presenting the note to him, is good. *Whitwell v. Johnson*, 17 Mass. 452; *Raborg v. Bank of Colum-*

bia, 1 Harr. & J. (Md.) 231. So, an established custom that notice, etc., to directors of a bank shall be left on the cashier's desk, is binding on the directors whose notes come into the bank. *Weld v. Gorham*, 10 Mass. 366. And it is held that, when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment and give notice on the *fourth* day of grace, the parties are bound by that usage, whether they have a personal knowledge of it or not. *Mills v. Bank of the United States*, 11 Wheat. 431, 438; and see *Renner v. Bank of Colombia*, 9 id. 581. Although the custom of a bank may be proved for the purpose of interpreting a contract, it is no evidence to establish one where an express contract would be necessary. *Harper v. Calhoun*, 8 Miss. (7 How.) 203. Nor will usages of banks be judicially noticed, but must be proved, or must have been heretofore proved and established by courts of justice, before they will be recognized and applied. *Planters' Bank v. Farmers', etc., Bank*, 8 Gill & J. (Md.) 449. See *Citizens' Bank v. Grafflin*, 31 Md. 507.

§ 3. **By-laws of bank, force of.** By-laws, rules and regulations, etc., of a bank, although made under authority of law, cannot affect the rights or interests of third persons. *Mechanics and Farmers' Bank v. Smith*, 19 Johns. 115. A by-law or rule, therefore, of a bank, that all payments made and received must be examined at the time, does not prevent a party dealing with the bank from showing, afterward, that there was a mistake in his account of deposits and receipts. *Id.* And see *Seneca County Bank v. Lamb*, 26 Barb. 595; *Driscoll v. West Bradley & Cary Manuf. Co.*, 59 N. Y. (14 Sick.) 96, 102. Evidence of the cashier as to what the by-laws of the bank are is inadmissible; the by-laws themselves are the best evidence. *Lumbard v. Aldrich*, 8 N. H. 31.

§ 4. **Liens of banks and bankers.** In general, whenever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands for the amount of his general balance, unless such securities were delivered to him under a particular agreement. *Bank of the Metropolis v. New England Bank*, 1 How. 234; S. C., 17 Pet. 174. But general liens for a balance of account are not favored. And if there be a usage giving to persons engaged in discounting, buying, advancing on, or selling bills or notes, a lien for a general balance against their customer, such usage should be proved. It will not be presumed to exist in the absence of an express agreement.

Grant v. Taylor, 3 Jones & Sp. (N. Y.) 338; 52 N. Y. (7 Sick.) 627.

Courts have judicially taken notice of the lien of "*bankers*" who are strictly such, and who are dealers in money. But even the lien of a *banker* does not exist if there be circumstances in any case inconsistent therewith. *Id. Brandao v. Barnett*, 3 Man., Gran. & S. 519; S. C., 12 Cl. & Fin. 805. A bank has no lien upon money standing to the credit of one of its depositors for the amount of a bill of exchange indorsed by such depositor, and discounted by the bank, but which bill has not yet matured. *Beckwith v. Union Bank*, 4 Sandf. (N. Y.) 604.

§ 5. Deposits, general and special. All deposits made with bankers may be divided into two classes, namely: 1. Those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and 2. That kind peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money, and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. *Marine Bank v. Fulton Bank*, 2 Wall. 252. Every deposit is *general*, and belongs to the class last mentioned, unless the depositor makes it *special*, or deposits it expressly in some particular capacity. *Keene v. Collier*, 1 Metc. (Ky.) 415.

When a deposit is made, it is usual for the cashier to give a certificate to that effect, or to credit the amount in the depositor's bank book, and from this may be gathered the nature of the deposit, whether it be general or special, or, in other words, whether it be generally passed to the credit of the depositor, or specially lodged for safe-keeping merely. *Foster v. Essex Bank*, 17 Mass. 479; see *Wallace v. State Bank*, 7 Ark. 61. In a general deposit of money, the depositor has no right to the particular money deposited, as in the case of a special deposit. *Lilly v. Commissioners*, 69 N. C. 300; *Ruffin v. Commissioners*, *id.* 498; see *Beatty v. McCleod*, 11 La. Ann. 76.

If money be deposited in a sealed packet, bag, box, or the like, the presumption is, that it was intended to be a special deposit (*Dawson v. Real Estate Bank*, 5 Ark. 283); and it would be a breach of trust in the bank or its officers to open such a packet, etc., or inspect its contents. *Foster v. Essex Bank*, 17 Mass. 479, 504. No profit, therefore, can arise to a bank from special deposits, unless it be that an increased, though it is evi-

dent, a fallacious credit, is acquired with the community on their account. Indeed, they are simply gratuitous on the part of the corporation, and the practice of receiving them must have originated in a willingness to accommodate members with a place for their treasures, more secure from fire and thieves than their dwelling-houses or stores; and this is rendered more probable from the well-known fact that not only money or bullion, but documents, obligations, certificates of public stocks, wills, and other valuable papers, are frequently, and in some banks as frequently as money, deposited for safe-keeping. *Id.* 504.

A banker, receiving a package of money as a special deposit without compensation, is bound only for slight care, and is responsible only for gross negligence. *Hale v. Rawallie*, 8 Kans. 137.

Where funds are deposited with a bank for a special purpose, with notice thereof, the bank cannot refuse to apply them to the object for which they were deposited, on the ground that a debt is due to it by the depositor. *Bank of the United States v. Macalester*, 9 Penn. St. 475.

§ 6. **Relation between bank and depositor.** The relation and relative obligations arising between a bank and its depositing customers, are in general simply those of debtor and creditor. *Foley v. Hill*, 2 H. L. Cas. 28; *Ætna National Bank v. Fourth National Bank*, 46 N.Y. (1 Sick.) 82; S. C., 7 Am. Rep. 314; *Boyd v. Bank of Cape Fear*, 65 N. C. 13; *Allen v. Fourth National Bank of New York*, 5 Jones & Sp. (N. Y.) 137; 59 N. Y. (14 Sick.) 12; *Buchanan, etc., Co. v. Woodman*, 1 Hun (N. Y.), 639; S. C., 4 N. Y. S. C. (T. & C.) 193. According to the usual course of business, and in the absence of any special agreement, the property in a deposit passes to the bank. The banker cannot be sued for money until after the customer has drawn for it, or in some way required its repayment. *Ante*, 253, 254.

The understanding between the parties is, that the money shall remain with the banker until the customer, by his check, or in some other way, calls for its repayment; and the banker is not in default, and no action will lie, until payment has been demanded. *Downs v. Phoenix Bank*, 6 Hill (N. Y.), 297; *Oddie v. National City Bank of New York*, 45 N. Y. (6 Hand) 735; S. C., 6 Am. Rep. 160; *Bank of the Republic v. Millard*, 10 Wall. 152; *ante*, 254. It is not the case of a bailment, unless the deposit is special. *Wray v. Tuskegee Ins. Co.*, 34 Ala. 58; *Egerton*

v. *Fulton National Bank*, 43 How. (N. Y.) 216; *Bank of Northern Liberties v. Jones*, 42 Penn. St. 536.

In the case of a general depositor, if the money, checks, or bills deposited are stolen, lost, or destroyed, or become of no value, the bank sustains the loss, and the depositor is still a creditor of the bank (*Matter of Franklin Bank*, 1 Paige, 249); and has no valid claim to a priority of payment over bill holders or other creditors. *Id.* And see *Ellis v. Linck*, 3 Ohio St. 66.

A bank is bound to exhibit its books to a depositor, on proper occasions, and the officers having charge of them are, *quo ad hoc*, the agents of both parties. *Union Bank v. Knapp*, 3 Pick. (Mass.) 96.

§ 7. **Repayment of deposits.** When money is deposited with a banker, it is payable on demand at the bank, unless some other agreement has been made with reference to its payment. The banker may pay the money upon an oral order, or transfer it from one account to another; and such oral order will be a sufficient authority and justification for so doing; but the banker is under no obligation to act upon such oral direction. By the usages of the banking business he is entitled to some written evidence of the order for money upon payment thereof. *McEwen v. Davis*, 39 Ind. 109. Banks incur a liability to the depositor by the simple act of depositing; that is, an assumpsit in law implied from an act *in pais*. And no engagement under seal is necessary to bind them to repay. *Bank of Kentucky v. Wister*, 2 Pet. 318; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326.

The promise of a bank to one of its depositors to pay all checks which he may draw does not make the bank liable to an action of contract by the holder of a check afterward drawn by him for part of the amount deposited. *Carr v. National Security Bank*, 107 Mass. 45; S. C., 9 Am. Rep. 6.; *Lloyd v. McCaffrey*, 46 Penn. St. 410; *Chapman v. White*, 6 N. Y. (2 Seld.) 412.

When a trustee deposits trust moneys in his own name in a bank with his individual money, the character of the trust money is not lost, but it remains the property of the *cestui que trust*. If such money can be traced into the bank, and it remains there, the owner can reclaim it. When deposited, the bank incurred an obligation to repay it, which is not lessened or impaired because it incurred, at the same time, an obligation to pay other money belonging to the agent individually. *Van Allen v.*

American Bank, 52 N. Y. (7 Sick.) 1; *Disbrow v. Mills*, 2 Hun (N. Y.), 132; S. C., 4 N. Y. S. C. (T. & C.) 682.

§ 8. Who may withdraw deposits. A banker will always be justified in making payments upon the orders of the person who made the deposit, or upon orders of any person whom he designates as competent to control it, until he has notice that the ownership is claimed by somebody else, adversely to either of these parties. *McEwen v. Davis*, 39 Ind. 109. See *Coffin v. Henshaw*, 10 id. 277; *Farmers', etc., Bank v. King*, 57 Penn. St. 202; *Swartwout v. Mechanics' Bank*, 5 Denio (N. Y.), 555. If a bank, having a deposit of money in the name of a firm, pays it out on the individual check of one of the firm in his own name only, it can only justify by showing that the money thus drawn was applied to the use of the firm. *Coote v. Bank of the United States*, 3 Cranch (C. C.), 50.

It has been held that payment by a savings bank to a person presenting a pass-book is good, if the officers have no notice of fraud upon the depositor, and in making such payment exercise reasonable care and diligence. *Schænwald v. Metropolitan Savings Bank*, 57 N. Y. (12 Sick.) 418; reversing S. C., 1 Jones & Sp. (N. Y.) 440; *Hayden v. Brooklyn Savings Bank*, 15 Abb. N. S. (N. Y.) 297.

§ 9. Demand of deposit. A bank depositor must make actual demand before he can sue to recover his deposit (*Johnson v. Farmers' Bank*, 1 Harr. [Del.] 117, 496; *Adams v. Orange County Bank*, 17 Wend. 514; *Downes v. Bank of Charlestown*, 6 Hill [N. Y.], 297); and the statute of limitations does not begin to run until demand has been duly made. *Girard Bank v. Bank of Penn Township*, 39 Penn. St. 92. But, where a bank suspends payment and closes its doors against its creditors, a party who has deposited money therein may maintain an action to recover the amount of his deposit, without first making a demand of payment. *Watson v. Phoenix Bank*, 8 Metc. (Mass.) 217. And a demand is not necessary to entitle a party to recover money deposited with the bank, after the bank has rendered an account claiming it as its own. *Bank of Missouri v. Benoist*, 10 Mo. 519. So, a notification by a bank to a depositor, that his claim will not be paid on demand at the counter, dispenses with the necessity of a demand, as preliminary to a right to sue, and the statute of limitations begins to run from that time. *Farmers' Bank v. Planters' Bank*, 10 Gill & J. (Md.) 422.

§ 10. **Checks, nature and requisites of.** A depositor may draw checks upon his banker at pleasure for the whole or any part of the moneys placed to his credit in bank, but until actual payment, or acceptance by the bank of the depositor's check, or an assignment of the credit by the depositor, and notice to the bank, the deposit is subject to the depositor's order. *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. (1 Sick.) 82; S. C., 7 Am. Rep. 314; *Lunt v. Bank of North America*, 49 Barb. 221. And he may recover substantial damages against his banker for dishonoring an acceptance and checks, if there be sufficient assets in the hands of the latter, at the time, to meet them. *Rolin v. Steward*, 14 Com. B. 595; *Whitaker v. Bank of England*, 1 Cr. Mees. & Ros. 744; *Marzetti v. Williams*, 1 Barn. & Ad. 415; *Boyd v. Emmerson*, 2 Ad. & E. 184, 202. But the right of the depositor is a chose in action, and his check does not transfer the debt, or give a lien upon it to a third person, without the assent of the depository. *Chapman v. White*, 6 N. Y. (2 Seld.) 412; *Ballard v. Randall*, 1 Gray, 605; *Wharton v. Walker*, 4 B. & C. 163; *Duncan v. Berlin*, 60 N. Y. (15 Sick.) 151. The holder of a check cannot, therefore, sue the bank for refusing payment in the absence of some special matter creating a privity between the bank and the holder. *Carr v. Nat. Security Bank*, 107 Mass. 45; S. C., 9 Am. Rep. 6, and note; *Bank of Republic v. Millard*, 10 Wall. 152; 2 Pars. on Notes & Bills, 61, and note; *Duncan v. Berlin*, 60 N. Y. (10 Sick.) 151. The recourse of the holder, in such case, is against the drawer, and not against the bank, although the bank, at the time the check was presented, held funds of the drawer sufficient to pay the check. *Id.*; *Moses v. Franklin Bank*, 34 Md. 574. It has, however, been held that where a bank receives a check drawn upon it and charges it against the drawer and settles with him upon that basis, the payee of the check has a right of action against the bank for the amount of the check. *Seventh Nat. Bank v. Cook*, 73 Penn. St. 751; S. C., 13 Am. Rep. 751; 3 Pitts. L. J. 193. See Bills and Notes.

A bank check is, in form and effect, substantially the same as an inland bill of exchange, and the rules applicable to the one are in general applicable to the other. *Murray v. Judah*, 6 Cow. 484; *Harker v. Anderson*, 21 Wend. 372; *Barnet v. Smith*, 10 Fost. (N. H.) 256. Checks are said, however, to possess the distinguishing characteristics that they are always drawn on a bank or banker; that they are payable

immediately on presentment, without the allowance of any days of grace, and that they are never presentable for mere acceptance, but only for payment. STORY, J., *In Matter of Brown*, 2 Story (C. C.), 502. See *Veazie Bank v. Winn*, 40 Me. 60; *Henderson v. Pope*, 34 Ga. 361; *Bowen v. Newell*, 5 Sandf. (N. Y.) 326; S. C., 2 Duer, 584; 8 N. Y. (4 Seld.) 190; *Ivory v. Bank of State of Missouri*, 36 Mo. 475; *Andrew v. Blackly*, 11 Ohio St. 89; *Harris v. Clark*, 3 N. Y. (3 Comst.) 93.

The holder of a check can recover against the indorser only when he has used due diligence in presenting it and giving notice of demand and non-payment by the bank. When the parties all reside in the same place, the holder should present the check on the day it is received, or on the following day, and when payable in a different place from that in which it is negotiable, the check should be forwarded by mail on the same or the next succeeding day for presentment. *Veazie Bank v. Winn*, 40 Me. 60; *Smith v. Jones*, 20 Wend. 192; *Smith v. Miller*, 43 N. Y. (4 Hand) 171; S. C., 3 Am. Rep. 690; *Bickford v. First Nat. Bank of Chicago*, 42 Ill. 238. So, it has been held that, in order to charge the drawer in case of the dishonor of a check, it must be presented for payment within a reasonable time, and notice given to the drawer within a like reasonable time, otherwise the delay is at the peril of the holder. *Daniels v. Kyle*, 5 Ga. 245; *Harker v. Anderson*, 21 Wend. 372. Other cases hold, however, that mere delay in presenting a check for payment will not discharge the drawer, unless he has been injured thereby. See *Little v. Phoenix Bank*, 2 Hill (N. Y.), 425; *Woodin v. Frazee*, 6 Jones & Sp. (N. Y.) 190; *Stewart v. Smith*, 17 Ohio St. 82; *Smith v. Jones*, 2 Bush (Ky.), 103; *Laws v. Rand*, 3 C. B. (N. S.) 442. But, while there is this confusion in the cases, as to the time within which a check payable on demand should be presented, there seems to be none in regard to the necessity of a demand of payment, a refusal to pay, and a notice thereof to the drawer, before he can be made liable by suit. *Ib.*; *Case v. Morris*, 31 Penn. St. 100; *Judd v. Smith*, 3 Hun (N. Y.), 190; 5 N. Y. S. C. (T. & C.) 255. If, however, the drawer of a check, payable instantly, has no funds at the time in the bank upon which it is drawn, it is, when unexplained, deemed a fraud, and the holder can sustain an action upon it, without presentment for payment or notice. *Hoyt v. Seeley*, 18 Conn. 353; *True v. Thomas*, 16 Me. 36; *Fitch v. Redding*, 4 Sandf. (N. Y.) 130. So, the drawer of a check, by stopping its

payment at the bank, relieves the holder, as against him, from any necessity of presentment and notice of non-payment. *Jacks v. Darrin*, 3 E. D. Smith (N. Y.), 557; *Purchase v. Mattison*, 6 Duer (N. Y.), 587. And, payment by the drawer, of part of a check, after it becomes due, excuses the holder from proving a demand on the bank. *Levy v. Peters*, 9 Serg. & R. (Penn.) 125. A holder who takes a check in good faith and for value received, several days after it is drawn, receives it without being subject to defenses of which he has no notice before or at the time his title accrues. *In re Brown*, 2 Story, 502; *Ames v. Meriam*, 98 Mass. 294. See *Lancaster Bank v. Woodward*, 18 Penn. St. 357.

Post-dated checks are payable on the day of their date, although negotiated beforehand. *Taylor v. Sip*, 1 Vroom. (N. J.) 284. And the payment by a bank of such a check before the day upon which it is dated, is a payment in its own wrong, and the money so paid remains to the credit of the drawer. *Ib.* The assignee, in good faith of this fund, may maintain an action against the bank for its recovery. *Godin v. Bank of Commonwealth*, 6 Duer, 76.

For a full discussion of this subject see Bills and Notes.

§ 11. **Certified checks.** When a check payable to bearer, or order, is presented with a view to its being marked "good," and is so certified, the sum mentioned in it must necessarily cease to stand to the credit of the depositor. It thenceforth passes to the credit of the holder of the check, and is specifically appropriated to pay it when presented; and as the purpose of having it so certified is not to obtain payment, but to continue with the bank the custody of the money, the holder can have no greater rights than those of any other depositor. *Farmers and Mechanics' Bank of Kent Co. v. Butchers and Drovers' Bank*, 4 Duer (N. Y.), 219; *Willeys v. The Phoenix Bank*, 2 id. 121; *Girard Bank v. Bank of Penn Township*, 39 Penn. St. 92. When a check is certified "good" by a bank, the bank does not warrant the genuineness of the body of the check, either as to payee or amount. It simply certifies to the genuineness of the signature of the drawer, and that he has funds sufficient to meet the check, and engages that those funds will not be withdrawn from the bank by him. It has accordingly been held, that where the plaintiff certified a check which had been altered, by changing the date, name of payee, and raising the amount, and subsequently paid the same to the defendant, that the amount could be recovered back as for money paid by mistake (*Marine*

National Bank v. National City Bank, 59 N. Y. [14 Sick.] 67; reversing S. C., 4 Jones & Sp. 470. See also *Espy v. Bank of Cincinnati*, 18 Wall. 604; *Bank of North America v. National Bank of Commonwealth*, 59 N. Y. [14 Sick.] 628; *N. Bank of C. in N. Y. v. N. M. Bank A. of N. Y.*, 55 N. Y. [10 Sick.] 211; *Mussey v. Eagle Bank*, 7 Metc. [Mass.] 306. But see *Seventh National Bank v. Cook*, 73 Penn. St. 483; *Barnet v. Smith*, 30 N. H. 256; *Rounds v. Smith*, 42 Ill. 245; *Merchants' Bank v. State Bank*, 10 Wall. 604), from which it would appear that the certification of a check as "good," by the authorized officer of a bank, absolutely binds the bank as acceptor. And see *Meads v. Merchants' Bank*, 25 N. Y. (11 Smith) 143.

§ 12. **Paying forged checks.** The drawee of a check is presumed to know the handwriting of the drawer and the genuineness of his signature to the paper; and having paid the same, although it should afterward be discovered that the name of the drawer was forged, the drawee cannot recover back the money from the party to whom it was paid. *Price v. Neal*, 3 Burr. 1354; *Weisser v. Denison*, 10 N. Y. (6 Seld.) 68. But the rule is otherwise where the forgery is not in counterfeiting the name of the drawer, but in altering the body of the check; for to require the drawee to know the handwriting of the body of the check is unreasonable, and, in most cases, would be requiring an impossibility. *Bank of Commerce v. Union Bank*, 3 N. Y. (3 Comst.) 230. See *Belknap v. National Bank*, 100 Mass. 376; *Commercial, etc., Bank v. First National Bank*, 30 Md. 11.

Hence, it is held that where a bank has paid by mistake to a *bona fide* holder a certified check, which, either before or after certification, had been fraudulently altered by raising the amount, it can recover back the sum thus paid. *National Bank of Commerce in New York v. National Mechanics' Banking Association of New York*, 55 N. Y. (10 Sick.) 211; *Marine National Bank v. National City Bank*, 59 N. Y. (14 Sick.) 67. See *ante*, § 11, and cases there cited. It is likewise held that a bank is not responsible for the genuineness of each indorsement preceding the party presenting or depositing the check. *Levy v. Bank of America*, 24 La. Ann. 220. But where a forged certification of a check is presented, at the bank upon which the check is drawn, to the teller whose certificate it purports to be, and he pronounces it genuine, he adopts the certification, and the bank is bound by it the same as though it were genuine. *Continental Bank v. Bank of the Commonwealth*, 50 N. Y. (5 Sick.) 575.

§ 13. **Notes payable at a bank.** By making a note negotiable at bank, the maker authorizes the bank to advance, on his credit, to the holder, the sum expressed in the note. *Mandeville v. Union Bank of Georgetown*, 9 Cranch, 9. The direction in a note, making it payable at a given bank, is equivalent to a request to the bank to pay it. *Griffin v. Rice*, 1 Hilt. (N. Y.) 184; see *Wood v. Merchants' Savings, etc., Co.*, 41 Ill. 267. It would, therefore, be a fraud on the bank to attempt a set-off against the note on account of transactions between the maker and the holder. *Mandeville v. Union Bank of Georgetown*, 9 Cranch, 9.

The certificate of a bank where a note is payable, that it is "good," is merely information that the maker has funds in the bank, and such information may be given verbally, by letter, or by a certificate on the note itself. The correctness of the certificate is a matter which the certifying bank has the means of knowing, and is bound to state correctly; being estopped from denying the truth of its statement, if the presenting bank, relying thereon, fails to charge the indorsers. *Irving Bank v. Wetherald*, 36 N. Y. (9 Tiff.) 335; and see *Marine Nat. Bank v. Nat. City Bank*, 59 N. Y. (14 Sick.) 67, 77.

§ 14. **Over-drafts.** A usage to allow customers to overdraw, and to have their checks and notes charged up, without present funds in the bank, is a usage and a practice to misapply the funds of the bank, which is not countenanced in a court of justice. See *Lancaster Bank v. Woodward*, 18 Penn. St. 357; *Minor v. Mechanics' Bank*, 1 Pet. 46. It is not, however, an uncommon thing for bankers to permit over-drafts, with an understanding that the account should be made good before the close of banking hours on that day, or soon after; and whether such over-drafts are prudent or not, depends upon the character and standing of the drawer, and upon the circumstances of each case. And where the transaction is in reality a loan upon sufficient security, if loss is sustained, a cashier is not liable for permitting it to be done in the form of an over-draft. *Commercial Bank of Albany v. Ten Eyck*, 48 N. Y. (3 Sick.) 305.

A bank may maintain an action against the drawer who has received moneys from their cashier on checks overdrawn. *Franklin Bank v. Byram*, 39 Me. 489; see *Keene v. Collier*, 1 Metc. (Ky.) 415; *Tradesmen's Bank v. Astor*, 11 Wend. 87. And it is held that where a party fraudulently overdraws his account at a bank, the property of the bills drawn out is not changed;

and the bank may follow them, except in the hands of a *bona fide* holder for valuable consideration, who has taken them in the ordinary course of business. *Tradesmen's Bank v. Merritt*, 1 Paige, 302. See *Justh v. Nat. Bank of Commonwealth*, 56 N. Y. (11 Sick.) 478.

If a party draws a check on a bank, without funds there to meet it, he is not entitled to notice of non-payment, nor is he discharged by the holder's delaying to present it within a reasonable time. *Cushing v. Gore*, 15 Mass. 69, 74; *Eichelberger v. Finley*, 7 Harr. & J. (Md.) 381. The drawing of a check under such circumstances is, when unexplained, a fraud which deprives the maker of all right to require presentment and demand of payment. *Franklin v. Vanderpool*, 1 Hall (N. Y.), 78; *Fitch v. Redding*, 4 Sandf. 130; *Healy v. Gilman*, 1 Bosw. 235.

§ 15. *Pass-books.* A regulation by a savings bank that the deposit will be paid only upon production of the pass-book, is held to be reasonable; with the qualification, however, that proof of its loss, or that the fact that it cannot be found after due search, will entitle the depositor to draw his deposit without it. *Warhus v. Bowery Savings Bank*, 21 N. Y. (7 Smith) 543. See *Heath v. Savings Bank*, 46 N. H. 78. And while the officers of a bank are held to the exercise of reasonable care and diligence, yet in paying money upon the presentation of a deposit-book, the disbursing officer is not required to demand strict proof of the identity of the depositor. *Sullivan v. Lewiston Institution for Savings*, 56 Me. 507; *Hayden v. Brooklyn Savings Bank*, 15 Abb. N. S. (N. Y.) 297; *Schoenwald v. Metropolitan Savings Bank*, 57 N. Y. (12 Sick.) 418; reversing S. C., 1 Jones & Sp. (N. Y.) 440; *Kelly v. Emigrant, etc., Savings Bank*, 2 Daly (N. Y.), 27. A by-law of a savings bank, assented to by its depositors, that the pass-book of each depositor containing his account shall be transferable to order, does not render such pass-book a negotiable instrument; and even if it did, it would not be so as to third parties. *Witte v. Vincenot*, 43 Cal. 325.

An entry by a bank teller, of the amount of a deposit in the bank-book of a dealer with the bank, being the act only of the agent of the bank, and not of both parties, is not conclusive. If, therefore, the dealer can afterward prove that there was a mistake in the entry, there is a remedy as in ordinary cases of mistake. *Mechanics and Farmers' Bank v. Smith*, 19 Johns. 115.

§ 16. **Certificate of deposit.** A certificate of deposit in the ordinary form is regarded, by some authorities, as possessing all the requisites of a negotiable promissory note. See *Bank of Orleans v. Merrill*, 2 Hill (N. Y.), 295; *Kilgore v. Bulkley*, 14 Conn. 363; *Laughlin v. Marshall*, 19 Ill. 390; *Carey v. McDougald*, 17 Ga. 84; *Cate v. Patterson*, 25 Mich. 191; *Leavitt v. Palmer*, 3 N. Y. (3 Comst.) 19. Other authorities regard it, however, as merely an instrument recording the agreement of the parties in respect of a certain deposit of money, the consideration of which is stated in the memorandum itself, and to be rather an agreement than a promissory note. See *Charnley v. Dulles*, 8 Watts & S. (Penn.) 353; *Talladega Ins. Co. v. Woodward*, 44 Ala. 287; *Sibree v. Tripp*, 15 Mees. & Wels. 23.

In a recent case it was held that a certificate of deposit issued by a bank is not a contract, but an evidence of debt, in the nature of a receipt, and that parol evidence is admissible to explain it, as in case of a receipt. *Hotchkiss v. Mosher*, 48 N. Y. (3 Sick.) 478. A certificate of deposit, like a deposit credited in a pass-book, is intended to represent moneys actually left with the bank for safe-keeping, which are to be retained until the depositor actually demands them. And such a certificate is not dishonored until presented. *National Bank of Fort Edward v. Washington Co. Nat. Bank*, 5 Hun (N. Y.), 605.

A bank certificate of deposit in the following form — “A has deposited in this bank \$440, subject to his order, payable only on the return of this certificate” — was held not negotiable. *Lebanon Bank v. Mangan*, 28 Penn. St. 452.

Under the provisions of a statute, which forbid the circulation of bills or notes not payable on demand, banks have no power to issue time certificates of deposit, and, if issued, they will be void. *Bank of Peru v. Farnsworth*, 18 Ill. 563; see also *Leavitt v. Palmer*, 3 N. Y. (3 Comst.) 19; *Bank of Orleans v. Merrill*, 2 Hill, 295.

§ 17. **Nature of bank notes or bills.** A bank note, popularly termed a “bank-bill,” is a promissory note, payable on demand to the bearer, made and issued by a person or persons acting as bankers and authorized by law to issue such notes. 1 Bouv. Dict. 187. Bank notes, strictly speaking, are not money, but for every purpose in the ordinary transaction of business, they are considered as money. *Morrill v. Brown*, 15 Pick. (Mass.) 177; *Governor v. Carter*, 3 Hawks (N. C.), 328; *Pierson v. Wallace*, 2 Eng. (Ark.) 282.

They are a good tender, unless especially objected to (*Warren v. Mains*, 7 Johns. 476; *Hoyt v. Byrnes*, 11 Me. 475; *Wheeler v. Knaggs*, 8 Ohio, 169); and they pass under the word "money" in a will, and, generally speaking, are treated as cash. See *Miller v. Race*, 1 Burr. 452; *United States Bank v. Bank of Georgia*, 10 Wheat. 347; *Drury v. Smith*, 1 P. Wms. 404; *Morris v. Edwards*, 1 Ohio, 189; S. C. again, *id.* 524. Bank *post notes*, being intended to circulate after they are due, like other bank notes, are not subject to the rules applicable to ordinary promissory notes, but are assimilated to ordinary bank notes. *Fulton Bank v. Phœnix Bank*, 1 Hall (N. Y.), 577. See, generally, as to bank notes, *Hastings v. Johnson*, 2 Nev. 190; *Cox v. Smith*, 1 *id.* 161; *Hood v. Miller*, 2 Duv. (Ky.) 103; *Buchegger v. Schultz*, 13 Mich. 420; *Ledford v. Smith*, 6 Bush (Ky.), 129. See Bills and Notes.

§ 18. **Destroyed, mutilated, or lost notes.** Where the destruction of a bank note is clearly established, the bank is bound to pay the owner the amount of it. *Bank of Louisville v. Summers*, 14 B. Monr. (Ky.) 306; *Hagerstown Bank v. Adams Express Co.*, 45 Penn. St. 419. See *Irwin v. Planters' Bank*, 1 Humph. (Tenn.) 145; *Tower v. Appleton Bank*, 3 Allen (Mass.), 387. So the holder of a bank note, who has divided it for the purpose of transmission by mail, and has lost one-half, can recover of the maker the amount of the whole note; but the negotiability is thereby destroyed, and no other person can recover therefor on the other half. *Bank of Virginia v. Ward*, 6 Munf. (Va.) 166; *Hinsdale v. Bank of Orange*, 6 Wend. 378.

§ 19. **Forged or stolen bills.** Any holder of lost or stolen bank bills, who has received them in good faith in the regular course of business and for a valuable consideration, can recover upon them against the bank. *City Bank v. Farmers', etc., Bank*, Taney, 119; *Olmstead v. Winsted Bank*, 32 Conn. 278. And an action to recover cannot be defeated by proof that the bills were protested before the plaintiff purchased them, and that he obtained them at a discount. *Ib.* Such *bona fide* holder does not, however, acquire an absolute title which he can transmit to a purchaser who has notice that the bills were stolen. *Ib.*

Notes issued by a bank, organized under an unconstitutional law, are void, and will constitute no consideration for a promissory note. *Skinner v. Demming*, 2 Ind. 558. If a bank receive as genuine forged notes purporting to be its own, and pass them to the credit of a depositor who acts in good faith, the bank is

bound by the credit thus given, and the notes must be treated as cash. *Bank of United States v. Bank of Georgia*, 10 Wheat. 333; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Salem Bank v. Gloucester Bank*, id. 1. But where a person obtained bank notes of a bank by means of a forgery, and exchanged them for other bank notes with another bank and individuals, it was held that the bank imposed on by the forgery was entitled to the last-mentioned bank notes, which were in the forger's possession, and had been received by him as its property. *Coffin v. Anderson*, 4 Blackf. (Ind.) 395.

§ 20. **Demanding payment of bank bill.** Before an action can be sustained upon a bank bill, promising payment upon demand, there must be a demand of payment, or circumstances must exist excusing a demand, although a bill is not made payable at any particular place (*Thurston v. Wolfborough Bank*, 18 N. H. 391. See *Dougherty v. Western Bank*, 13 Ga. 287; *Bryant v. Damariscotta Bank*, 17 Me. 240; *State Bank v. Van Horn*, 4 N. J. L. [1 South.] 382), from which it would appear that a bank bill, like any other note of hand payable on demand, but having no place of payment appointed therein, may be sued, and the action may be sustained without proof of any special demand. See also *Ware v. Street*, 2 Head (Tenn.), 609.

It is generally true, however, that a cause of action on bank bills does not accrue until a demand and refusal. *Crawford v. Bank of Wilmington*, Phill. L. (N. C.) 136; *National Bank of Fort Edward v. Washington County National Bank*, 5 Hun, 605. But one demand of payment in the aggregate is sufficient on presenting to a bank a number of its own bills (*Suffolk Bank v. Lincoln Bank*, 3 Mason, 1; *Reapers' Bank v. Willard*, 24 Ill. 433); and if a bank closes its doors, and has no place of business, a demand is not at all necessary in order to sustain an action upon its bills. *Thurston v. Wolfborough Bank*, 18 N. H. 391. So if notes made payable at a branch of the principal bank are called in by the latter, a demand at the latter entitles the holder to sue that bank on non-payment. *Nashville Bank v. Henderson*, 5 Yerg. (Tenn.) 104. And in a suit against one who passes the note of a broken bank, fraudulently, or with a promise to take it back if found to be uncurrent, a demand on the makers need not be proved. *Hellings v. Hamilton*, 4 Watts & Serg. (Penn.) 462.

Upon demand and refusal to pay a bank note, the holder becomes entitled to interest from that time to the date of actual

payment, the same as upon ordinary liquidated debts over due. And the fact that the note is not expressed to be payable "with interest" does not defeat the right. *Estate of the Bank of Pennsylvania*, 60 Penn. St. 471. And see *Bank v. Thornsberry*, 3 B. Monr. (Ky.) 519.

§ 21. **Mode of payment.** It is the duty of a bank, on the money being demanded upon its notes, to pay within a reasonable time according to circumstances. And if there be unreasonable delay, it amounts to a refusal of payment. *Reapers' Bank v. Willard*, 24 Ill. 433. Thus a bank cannot, at its option, pay out in small pieces when it has large on hand, thereby creating delay; and it should keep money ready counted out, or servants sufficient to count it out within a reasonable time. *Ib.* *Suffolk Bank v. Lincoln Bank*, 3 Mason, 1; *Hubbard v. Chenango Bank*, 8 Cow. 88. See *People v. Dubois*, 18 Ill. 333; *Boatman's, etc., Inst. v. Bank of Missouri*, 33 Mo. 497.

The fact that bank notes are below par does not render their circulation illegal; but the bank must pay the face of them to the holder, although he took them below par. *Robison v. Beall*, 26 Ga. 17. So, the maker of a note payable to a bank of issue, has a right to tender the bills of such bank in payment of the note; and the bank cannot, by an assignment of its effects, deprive its debtor of this right. *Blount v. Windley*, 68 N. C. 1.

§ 22. **Refusal to redeem, consequence of.** The failure of a bank to redeem its notes is a question for the State to inquire into, and the bank possesses the power to make loans until its charter shall have been declared forfeited. *Robinson v. Bank of Darien*, 18 Ga. 65; *Maury v. Ingraham*, 28 Miss. 171. The mere act of suspending payment, without any general derangement of the business of the bank, is not, intrinsically, and apart from any statute provision, a forfeiture of its charter; and especially where the legislature have provided a remedy by imposing a penalty or damages for refusal to redeem notes. *State v. Commercial Bank of Cincinnati*, 10 Ohio, 535. But the suspension may be carried so far as to afford evidence of an entire misuser of its powers, and thus extinguish its chartered privileges. *Ib.* See *Rockwell v. State*, 11 id. 130; *Livingston v. Bank of N. Y.*, 26 Barb. (N. Y.) 304; S. C., 5 Abb. 338; 2 Broom & Had. 412, 413, and notes (Wait's ed.).

§ 23. **Loans and discounts.** As a general rule a bank, in making a loan, must confine itself to its capital, or to its own notes, which it is legally liable to redeem; and if it give out something else it

must show that the transaction is in substance the same. *Mawry v. Ingraham*, 28 Miss. 171. See *Bank of the State v. Ford*, 5 Ired. (N. C.) 692. But a power in the charter to loan on banking principles does not restrict the corporation from loaning their notes at a discount, with an agreement on the part of the borrower to redeem with specie the identical bank notes received by him on the loan, if they should be returned to the bank during the continuance of the loan, and also to purchase of the company, with specie during the loan, a certain amount of other bank notes not current at par. *Northampton Bank v. Allen*, 10 Mass. 284.

If a bank charge a higher rate of interest than is allowed by its charter, and the charter is silent as to the effect or penalty of such overcharge, the effect is not to render the whole note void, but only the excess beyond the legal rate; which excess, if paid, can be recovered by the borrower or his assignee, either at law or in equity. *Darby v. Boatmen's Sav. Inst.*, 1 Dill. 141. See *Rock River Bank v. Sherwood*, 10 Wis. 230; *Commercial Bank v. Nolan*, 8 Miss. 508. A bank buying a usurious note stands upon the same footing as an individual, unless its charter or some statute provides differently. *Chafin v. Lincoln Sav. Bank*, 7 Heisk. (Tenn.) 499. In the case of a mercantile discount, and ordinary bills and notes are to be deemed such, the bank may deduct the whole interest for the time they have to run. This is only an anticipation of funds and not usury. *Bank of Alexandria v. Mandeville*, 1 Cranch, 552. But the privilege given to a bank, in its charter, to discount upon moneys deposited for safe keeping, does not extend to special deposits. *Foster v. Essex Bank*, 17 Mass. 479.

Where one borrowing money at a bank has an opportunity and is able to count the money himself, but does not, and accepts the count of the bank officer as a performance of the contract of loan, then, although such acquiescence and acceptance will not be conclusive upon him, if there be, in fact, a mistake, yet the courts should require clear and satisfactory proof to open the transaction and recover for such mistake. And the burden of showing a mistake rests upon the party seeking to recover. *First Nat. Bank v. Haight*, 55 Ill. 191.

An agreement by the president and cashier of a bank that the indorser of a promissory note shall not be liable on his indorsement, does not bind the bank. *Bank of the United States v. Dunn*, 6 Pet. 51. All discounts are made under the authority

of the directors, and it is for them to fix any conditions which may be proper in loaning money. *Ib.*

§ 24. **Collections by banks and bankers.** When a note is deposited with a bank for collection, and no special agreement is made, the contract to be implied is one of agency merely, and the duties and liabilities of the bank are those of an agent of the holder or depositor. *Montgomery County Bank v. Albany City Bank*, 7 N. Y. (3 Seld.) 459; *Bank of Mobile v. Huggins*, 3 Ala. 206; *Alley v. Rogers*, 19 Gratt. (Va.) 366. But in no sense is the bank the agent of the maker of the note. And a maker, who pays his note at bank, cannot recover back the payment from the bank on the ground that it has failed to account to the owner. *Smith v. Essex Co. Bank*, 22 Barb. (N. Y.) 627; see *Runyon v. Latham*, 5 Ired. L. (N. C.) 551.

The fact that a bank, receiving paper for collection, may reasonably expect that, according to the usual course of business, the proceeds may lie in their hands a longer or shorter period, is a sufficient consideration for their undertaking to collect. *Smedes v. Utica Bank*, 20 Johns. 372. See *Thompson v. Bank of the State*, 3 Hill (S. C.), 77.

§ 25. **Liability of collecting bank.** A bank receiving a bill or promissory note for collection, in the usual course of business, is bound to use reasonable skill and diligence in making the collection (*Fabens v. Mercantile Bank*, 23 Pick. [Mass.] 330); and whether the bill or note be payable at its counter or elsewhere, the bank is held liable for any neglect of duty occurring in its collection, by which any of the parties are discharged, whether of the officers and immediate servants, or other agents of the bank, or its correspondents, or agents employed by such correspondents. *Ayrault v. The Pacific Bank*, 47 N. Y. (2 Sick.) 570; S. C., 7 Am. Rep. 489; *ante*, 244. But see *Daly v. Butchers and Drovers' Bank, etc.*, 56 Mo. 93. This general liability may be varied by express contract or by implication arising from general usage, but the practice or usage of banks adopted for their own convenience in the transaction of their business, cannot vary the contract between them and their dealers. *Ib.* See *Crow v. Mechanics and Traders' Bank*, 12 La. Ann. 692; *Bank of Montgomery v. Knox*, 1 Ala. 148; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. (3 Seld.) 459. In accordance with the rule above stated, it is held that if a bank employs a notary to present the note for payment, and to give the proper notices to charge the parties, the notary is the agent of the bank, and

not of the depositor or owner of the paper, and the bank is liable for any neglect of duty by him, by which any of the parties are discharged. *Ayrault v. The Pacific Bank*, 47 N. Y. (2 Sick.) 570; S. C., 7 Am. Rep. 489; *ante*, 244. But see, *contra*, *Bawling v. Arthur*, 34 Miss. 41; *Citizens' Bank v. Howell*, 8 Md. 530; *Daly v. Butchers and Drovers' Bank, etc.*, 56 Mo. 93; *Wingate v. Mechanics' Bank*, 10 Penn. St. 104; *Ætna Ins. Co. v. Allen Bank*, 25 Ill. 243.

§ 26. **Employing second bank.** Bills of exchange payable at distant places, and left with a bank for collection, are presumed to be intended to be transmitted to, and collected by, suitable sub-agents at the places where payable; since it cannot be expected that a bank will employ one of its officers to journey about and collect such bills. It has, therefore, been held that, in such case, as in the case of bills expressly left with a bank for transmission only, if the bank in good faith employs suitable sub-agents for collection, it is not liable for their neglect or default. *Bank of Washington v. Triplett*, 1 Pet. 25; *Mechanics' Bank v. Earp*, 4 Rawle (Penn.), 384; *Fabens v. Mercantile Bank*, 23 Pick. (Mass.) 330; *Daly v. Butchers and Drovers' Bank, etc.*, 56 Mo. 93; *ante*, 251. An opposite doctrine is, however, held in New York. *Allen v. Merchants' Bank*, 22 Wend. 215; *Ayrault v. The Pacific Bank*, 47 N. Y. (2 Sick.) 570; S. C., 7 Am. Rep. 489. And see *Young v. Noble*, 2 Disney (Ohio), 485. *Ante*, § 25; *ante*, 251.

§ 27. **Liability of second bank.** The ordinary course of business in transmitting paper from a bank holding it to another bank for collection, does not give the bank employed to collect any better title to the paper or its proceeds, than that of the original bank. And unless there are special circumstances tending to constitute the collecting bank an owner for value, it holds the paper subject to any rights of one showing himself to be the true owner, or any equities or defenses of the maker, which would be available against the principal bank. *Commercial Bank of Clyde v. Marine Bank*, 1 Abb. Ct. App. (N. Y.) 405; S. C., 3 Keyes, 337; 6 Abb. N. S. 33; 1 Trans. App. 302; 37 How. 432; *Dickerson v. Wason*, 47 N. Y. (2 Sick.) 439; S. C., 7 Am. Rep. 455; *Dod v. National Bank*, 59 Barb. 265; *Quebec Bank of Toronto v. Weyand*, 2 Cinn. (Ohio) 538. See *First Nat. Bank v. Bache*, 71 Penn. St. 213; *Arnold v. Macungie Savings Bank*, *id.* 287. The collecting bank is bound to present the bill or note for payment, and if not paid at maturity, to give due notice of

the dishonor to the bank from which the note was received ; but it is not required, in the absence of express contract or usage, to give notice to any other party to the note. *Phipps v. Millbury Bank*, 8 Metc. (Mass.) 79 ; *State Bank v. Bank of the Capitol*, 41 Barb. 343. But see *Smedes v. Bank of Utica*, 20 Johns. 372.

• Money collected by one bank for another, placed by the collecting bank with the bulk of its ordinary banking funds and credited to the transmitting bank in account, becomes the money of the former. Hence, it is held that any depreciation in the specific bank bills received by the collecting bank, which may happen between the date of the collecting bank's receiving them and the other bank's drawing for the amount collected, falls upon the former. *Marine Bank v. Fulton Bank*, 2 Wall. 252. That a bank may recover from another bank, employed by it to collect a note, a sum of money paid out by mistake of fact, see *Union Nat. Bank v. Sixth Nat. Bank*, 43 N. Y. (4 Hand) 452.

A Cincinnati banking firm, Y. & P., after receiving from the owner a bill of exchange, and undertaking, gratuitously, to send it for collection to a bank in New York, where payable, and pay over the proceeds to the owner, ordered the bank when the bill was paid to place the proceeds to their general accounts, which the bank did, but failed before the money was drawn by Y. & P. It was held that Y. & P. were liable to the owners for the proceeds. The bank became their agent in the collection. *Young v. Noble*, 2 Disney (Ohio), 485.

§ 28. Powers and duties of cashier. In all transactions in which a bank may lawfully engage, the cashier is its managing agent, and speaks for the corporation. *Caldwell v. Mohawk, etc., Bank*, 64 Barb. 333. He is the general executive officer to manage the concerns of the bank, in all things not peculiarly committed to the directors. *Bissell v. First Nat. Bank*, 69 Penn. St. 415 ; *ante*, 221. His acts, to be binding upon the bank, must be done within the ordinary course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives, directly or through the subordinate officers of the bank, all moneys and notes of the bank, delivers up all discounted notes and other securities, when they have been paid, draws checks to withdraw the funds of the bank, when they have been deposited, and, as the executive officer of the bank, transacts most of its business. *United States v. City Bank of*

Columbus, 21 How. 356; *Bank of Metropolis v. Jones*, 8 Pet. 12; *State v. Commercial Bank*, 14 Miss. (6 Smed. & M.) 218; *Ryan v. Dunlap*, 17 Ill. 40; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Sel. Cas. (Penn.) 180, 243. He is the financial officer of the bank, and his agreements in behalf of his principal, in all matters relating to its business of discounting and banking, are binding upon it to the same extent as if made by a resolution of the board of directors. *Wakefield Bank v. Truesdell*, 55 Barb. 602.

But the acts of a cashier are only binding upon the bank when he acts within the scope of his "ordinary duties." And this is held not to comprehend a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it is such as has been loaned in the customary way (*United States v. City Bank of Columbus*, 21 How. 356); nor can a cashier purchase or sell the property of, or create an agency of any kind for, a bank, without authority so to do (Ib.); and he has no authority, upon a note being offered for discount, to bind the bank by his declaration to a person about to become an indorser on it, that he will incur no risk or responsibility by his becoming an indorser upon such discount. *Bank of Metropolis v. Jones*, 8 Pet. 12; see *Merchants' Bank v. Marine Bank*, 3 Gill. (Md.) 96; *Harrisburg Bank v. Tyler*, 3 Watts & S. (Penn.) 373. So the general powers of a cashier do not include an authority to bind the bank to indemnify an officer for levying upon property on an execution in favor of the bank (*Watson v. Bennett*, 12 Barb. 196); and the president and cashier of a bank have no power as such to execute a mortgage on the real estate of the corporation (*Leggett v. New Jersey Manuf. and Banking Co.*, 1 N. J. Eq. 441); nor is either one of them empowered, *virtute officii*, merely and without express authority from the board of directors, to release the maker of a note, payable to and held by the bank, from his legal liability on such note (*Hodge v. National Bank*, 22 Gratt. [Va.] 51); nor has the cashier, as such, any authority in another State, to settle an account, taking private notes and drafts, and giving a receipt in full. *Manhattan Life Ins. Co. v. Farmers', etc., Nat. Bank*, 1 Biss. 146. He may, however, in virtue of his general employment, borrow on behalf of the bank. *Barnes v. Ontario Bank*, 19 N. Y. (5 Smith) 152; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120. And the acts of a cashier of a bank in pursuance of authority from the board of directors,

although in violation of the law of its existence, bind the bank. *Hagerstown Bank v. London, etc., Soc.*, 3 Grant's Cas. (Penn.) 135; *Badger v. Bank of Cumberland*, 26 Me. 428. So, if the directors, either through inattention or otherwise, suffer the cashier to pursue a particular line of conduct for a considerable period, without objection, the bank will be bound by his acts. *Caldwell v. Mohawk, etc., Bank*, 64 Barb. 333.

The cashier of a bank is bound to exercise reasonable skill and ordinary care and diligence in the performance of his duties. *Commercial Bank of Albany v. Ten Eyck*, 48 N. Y. (3 Sick.) 305. In the absence of fraud or collusion, he is not liable to the bank for an act done under the direction of its president, the managing officer, and where the circumstances do not disclose the absence of due care and diligence upon his part. Thus, where the transaction is in reality a loan upon sufficient security, if loss is sustained, a cashier is not liable for permitting it to be done in the form of an overdraft. *Ib.*

Where a cashier applies the notes of the bank to his own use, he is liable for the full nominal amount, and cannot avail himself of their depreciation. *Pendleton v. Bank of Kentucky*, 1 T. B. Monr. (Ky.) 177.

CHAPTER XXIII.

BILLS OF LADING.

TITLE I.

OF THE RIGHTS, DUTIES, LIABILITIES AND REMEDIES OF PARTIES TO BILLS OF LADING, OR TO INDORSEES OR HOLDERS OF THEM, OR OF POSSESSORS OF THE PROPERTY IN THEM.

ARTICLE I.

GENERAL PRINCIPLES RELATING TO BILLS OF LADING.

Section 1. Nature of a bill of lading. A bill of lading is a document that has been in general use among all commercial nations from the earliest times, and it is briefly defined to be the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight (*Mason v. Lickbarrow*, 1 H. Bl. 359); or it forms the contract between the consignor and the carrier for the transportation of the goods. *Grace v. Adams*, 100 Mass. 505. A more extended definition, and one approved by the courts is, that the bill of lading is a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated. *Abbott Ship*. 323; and see *O'Brien v. Gilchrist*, 34 Me. 558; *The Delaware*, 14 Wall. 600. Some writers give it as an example of an instrument which partakes of a two-fold character; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument. *Ib.* *The Mayflower*, 3 Ware, 300; *Caftero v. Welsh*, 1 Leg. Gaz. Rep. (Pa.) 121; *Sack v. Ford*, 13 C. B. (N. S.) 100; *Adams v. Packet Co.*; 5 id. 492; *Wolfe v. Myers*, 3 Sandf. (N. Y.) 7. And it is held that any instrument, however informal, which has these characteristics, will take effect as a bill of lading. See *Wayland v. Mosely*, 5 Ala. 430; *Dows v. Greene*, 24 N. Y. (10 Smith) 638; *Rawls v.*

Deshler, 4 Abb. Ct. App. (N. Y.) 12, 19; S. C., 3 Keyes, 572; *Lickbarrow v. Mason*, 1 Sm. Lead. Cas. 900.

A bill of lading is called a maritime contract—a sea document—and it has been questioned whether a receipt given by a carrier for goods or merchandise placed in his hands for transportation from one part of the same country to another, along the line of a canal or railroad, is a bill of lading in the sense of the commercial law. See *Bryans v. Nix*, 4 Mees. & Wels. 775; *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76, 109; 1 Sm. Lead. Cas. 900. But this doubt is said to have but little foundation, and is impliedly excluded by the decisions in this country, which treat the legal effect of instruments of this description as the same, whether the property which they represent is carried by land or across the ocean. *Ib.* *Dows v. Perrin*, 16 N. Y. (2 Smith) 325; *Grace v. Adams*, 100 Mass. 505; *Blade v. Chicago, etc., R. R.*, 10 Wis. 505; *Dows v. Rush*, 28 Barb. 157.

§ 2. **Who may make them.** The bill of lading must be signed by the master, or by some one authorized by him (*Covill v. Hill*, 4 Denio [N. Y.], 323; *Wolfe v. Myers*, 3 Sandf. [N. Y.] 7); and a writing, which is, in form, a bill of lading, but signed only by the consignor, is not a bill of lading. *Gage v. Jaqueth*, 1 Lans. (N. Y.) 207; but see *Dows v. Greene*, 32 Barb. 490. By a usage recognized, however, in some of our commercial cities, the bill of lading is signed and delivered in the counting-room of the owners by a clerk of the owner. And a bill of lading signed by the clerk of a canal boat line, in the name of the owners, was held a valid bill of lading. *Dows v. Perrin*, 16 N. Y. (2 Smith) 328. The signature of the master would seem to be important, only as representing the owner. *Ib.* See *Putnam v. Tillotson*, 13 Metc. (Mass.) 517; *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120; *Dows v. Greene*, 30 Barb. 490; *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76, 110.

§ 3. **To whom given.** Bills of lading are usually made out in sets of three. One is retained by the consignor, one is sent either with the goods or by a separate conveyance to the consignee, and the master should always retain one for his own use. See *The Delaware*, 14 Wall. 579, 596; *Covill v. Hill*, 4 Denio, 323, 330.

• § 4. **Form and requisites.** A bill of lading should state, among other things, by whom the goods are shipped, and where, and to whom they are to be delivered, and all its statements should be exactly accurate. Such an instrument acknowledges the bailment of the goods, and is evidence of a contract for the safe cus-

tody, due transport, and right delivery of the same, upon the terms, as to freight, therein described, the extent of the obligation being specified in the instrument. See *Knox v. The Ninetta*, Crabbe, 534; *Dickerson v. Seelye*, 12 Barb. 99; *O'Brien v. Gilchrist*, 34 Me. 554. Contracts for the freighting of goods on our canals and railroads are usually less full and formal than when the property is to be carried by sea; but they must have all the essential qualities or else they cannot have the effect of bills of lading. *Covill v. Hill*, 4 Denio, 330; *Wolfe v. Myers*, 3 Sandf. 7. See *Dows v. Perrin*, 16 N. Y. (2 Smith) 328. The master is not bound to specify the freight in a bill of lading. *The Mayflower*, 3 Ware, 300.

Regularly, the goods ought to be on board before the bill of lading is signed. *The Loon*, 7 Blatchf. 244; *Lickbarrow v. Mason*, 2 T. R. 63, 75. But if the bill of lading, through inadvertence or otherwise, is signed before the goods are actually shipped, as if they are received on the wharf or sent to the warehouse of the carrier, or are delivered into the custody of the master or other agent of the owner or charterer of the vessel, and are afterward placed on board, as and for the goods embraced in the bill of lading, it is clear that the bill of lading will operate on those goods as between the shipper and the carrier by way of relation and estoppel, and that the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed. *The Eddy*, 5 Wall. 495; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307; *The Delaware*, 14 Wall. 579, 600. See *The Peytona*, 2 Curtis (C. C.), 21; *Graham v. Ledda*, 17 La. Ann. 45.

Where the goods of a consignment are not all sent on board at the same time, it is usual for the master, mate or other person in charge of the deck, and acting for the carrier, to give a receipt for the parcels as they are received; and when the whole consignment is delivered, the master, upon the receipt being given up to him, makes out the bill of lading in the usual form. He should be careful, however, not to give a bill of lading until the receipts are given back to him; for if he does, he will render himself doubly liable (*Gosling v. Birnie*, 7 Bing. 339; *Keyser v. Harbeck*, 3 Duer [N. Y.], 373; *Merc. Mut. Ins. Co. v. Chase*, 1 E. D. Smith [N. Y.], 115; *Bryans v. Nix*, 4 Mees. & Wels. 775); as he would also do, by giving two bills of lading for the same goods to different persons. *Stille v. Traverse*, 3 Wash. (C. C.) 43.

§ 5. **Duration and currency.** A bill of lading remains in force

until there has been a complete delivery of the goods thereunder to a person having a right to receive them. *Meyerstein v. Barber*, L. R., 2 C. P. 38; S. C. affirmed, id. 661. But while this is the general rule, there is nothing final or irrevocable in the nature of a bill of lading. The owner of the goods may, therefore, change his purpose before the delivery of the goods themselves or of the bill of lading to the party named in it, and may order the delivery to be to some other person, to B instead of to A. *Mitchell v. Ede*, 11 Ad. & El. 888, 902; S. C., 3 P. & D. 513. But when goods have been put on board a ship to be conveyed on freight, and bills of lading have been signed by the master, the owner of the goods cannot, before the sailing of the ship, insist on their being re-delivered to him without paying the freight that would become due for their carriage, and indemnifying the master against the consequences of his signing the bills of lading. *Tindall v. Taylor*, 4 El. & Bl. 219; S. C., 24 L. J., Q. B. 12.

§ 6. *Negotiability.* A bill of lading is frequently called a "negotiable instrument," from the resemblance it bears, in some respects, to a promissory note payable to order. *Lickbarrow v. Mason*, 2 T. R. 63; *The Water Witch*, 1 Black, 494; *Jenkyns v. Usborne*, 7 Man. & Gr. 678, 698; *McCants v. Wells*, 4 Rich. N. S. 381. But it is now settled that, properly speaking, a bill of lading is not a negotiable, but only a *quasi* negotiable instrument. See *Stanton v. Eager*, 16. Pick. (Mass.) 467, 474; *Rowley v. Bigelow*, 12 id. 307, 314; *Saltus v. Everett*, 20 Wend. 267, 280; *Decan v. Shipper*, 35 Penn. St. 239.

The word "assigns" is used, and not the word "order." At common law the mere use of the former word would not make a *chase in action* transferable; but the law merchant establishes an exception in favor of bills of lading, so that by their indorsement and delivery an indorsee may sustain an action against the owner or master as the *prima facie* owner of the goods therein specified. But he cannot, generally, bring the action on the bill of lading in his own name. *Thompson v. Dominy*, 14 Mees. & Wels. 402; *Dows v. Cobb*, 12 Barb. 310; *Lineker v. Ayeshford*, 1 Cal. 75; *Blanchard v. Page*, 8 Gray (Mass.), 297. See *Tindal v. Taylor*, 4 El. & Bl. 219; S. C., 28 Eng. L. & Eq. 210, 216. In admiralty, the assignee may, however, sue in his own name. *Cobb v. Howard*, 3 Blatchf. (C. C.) 524. And see *The Vaughan*, 14 Wall. 258; *The Thames*, id. 98; *McKinlay v. Morrish*, 21 How. 355.

And when the common-law rule has been changed by a statute, as where it authorizes an action to be brought in the name of the real party in interest, the party beneficially interested may sue in his own name. In New York, and in several other States, this rule prevails under the provisions of the Codes of Procedure.

Goods will not pass to third parties by the mere delivery of a bill of lading without indorsement; so the operation of the bill may be qualified and restricted by a conditional indorsement. *Mitchell v. Ede*, 11 Ad. & El. 903; *Ackerman v. Humphrey*, 1 C. & P. 57.

§ 7. **Exemption of risks.** The rule is now well established that the signing of a bill of lading, acknowledging to have received the goods in question in good order and well conditioned, is *prima facie* evidence that, as to all circumstances which were open to inspection and visible, the goods were in good order; but it does not preclude the carrier from showing, in case of loss or damage, that the loss proceeded from some cause which existed, but was not apparent when he received the goods, and which, if shown satisfactorily, will discharge the carrier from liability. *Nelson v. Woodruff*, 1 Black, 156; *Hastings v. Pepper*, 11 Pick. (Mass.) 41; *Richards v. Doe*, 100 Mass. 524; *The Olbers*, 3 Ben. 148. But in case of such loss or damage the presumption of law is that it was occasioned by the act or default of the carrier, and of course the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible. *Hastings v. Pepper*, 11 Pick. (Mass.) 41. In other words, after the damage to the goods has been established the burden lies upon the respondent to show that it was occasioned by one of the perils from which they were exempted by the bill of lading. *Clark v. Barnwell*, 12 How. 272. And see *Hooper v. Rathbone*, Taney, 519; *The Oriflamme*, 1 Sawyer, 176; *Transportation Co. v. Downer*, 11 Wall. 129; *Colt v. M'Mechan*, 6 Johns. 160; *The Juniata Paton*, 1 Biss. 15; *Bissell v. Price*, 16 Ill. 408; *Grieff v. Switzer*, 11 La. Ann. 324. But if the bill of lading contains the clause "loss by breakage or leakage excepted," this rule is changed, and under such a bill the shipper, in order to recover for leakage, must make affirmative proof of negligence on the part of the carrier. *Thomas v. Ship Morning Glory*, 13 La. Ann. 269; *The Invincible*, 1 Low, 225; *Ohrloff v. Briscall*, L. R., 1 P. C. 231.

Where goods were laden on board a ship, the bill of lading containing an exception of "the perils of the seas," and the

ship ran foul of another ship without any fault in the master of either, it was held to be an injury by the perils of the sea within the exception. *Buller v. Fisher*, Peake's Ad. Cas. 183. But it is otherwise if the loss of goods occur by reason of a collision caused by the gross negligence of the master or crew. *Lloyd v. General Iron Screw Collier Company*, 3 H. & C. 284. So, the explosion of a boiler on a steam vessel is held not "one of the perils of navigation," within the usual exception in a bill of lading. *The Mohawk*, 8 Wall. 153.

It is stated as a general principle, that if the bill of lading is accepted by the consignor without objection to its terms, any conditions which it may contain, restrictive of the carrier's liability, if such as the law will allow to be made by an express contract, become binding upon him. *Grace v. Adams*, 100 Mass. 505. See *Bostwick v. Baltimore, etc., R. R. Co.*, 45 N. Y. (6 Hand) 712. And this principle has been applied to an ordinary express receipt, given by an express company, and containing a stipulation that the company should not be liable for any loss, etc., occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. *Ib.* See *post*, § 17; *Farnham v. Camden, etc., R. R. Co.*, 55 Penn. St. 53.

§ 8. **Rights of shipper of property.** The delivery of a bill of lading should be as effectual as the delivery of the goods themselves. *Meyerstein v. Barber*, L. R., 2 C. P. 38, 44. But in order to render the bill of lading equivalent to the possession of the goods which it represents, it must be obtained from the true owner, or from some one duly authorized by him, or by virtue of some act on his part which justifies the belief that such authority has been given. *Western Trans. Co. v. Marshall*, 24 N. Y. (10 Smith) 638. And the unauthorized delivery of a bill of lading by the master of a vessel, or by an agent to whom it has been intrusted for a temporary or special purpose, or with instructions not to deliver it except on terms which are not fulfilled, followed by its indorsement to a *bona fide* purchaser, will not raise the title of the latter higher than that of the indorser. or preclude the vendor from stopping the goods *in transitu*, or from rescinding the contract. *Ib.*; *Craven v. Ryder*, 6 Taunt. 433; *Blossom v. Champion*, 37 Barb. 554; *Lickbarrow v. Mason*, 1 Sm. Lead. Cas. 900; *Decan v. Shipper*, 35 Penn. St. 243.

§ 9. **Rights of indorsee or holder.** The delivery of a bill of lading indorsed puts it in the power of the indorsee to transfer the property to a *bona fide* purchaser for a valuable consideration,

and deprives the original owner of any right of stoppage *in transitu*. *Jenkyns v. Usborne*, 7 Man. & Grang. 678; 13 L. J., C. P. 196; *Newsom v. Thornton*, 6 East, 41; *Dows v. Greene*, 24 N. Y. (10 Smith) 638. When the goods are shipped or afloat the bill of lading represents them, and the indorsement and delivery of it has exactly the same effect as the delivery of the goods themselves, when the intention is to transfer thereby the title to the goods, or to pledge them by way of security for advances made, or otherwise. *Meyerstein v. Barber*, L. R., 2 C. P. 661; *Indiana, etc., Bank v. Colgate*, 4 Daly (N. Y.), 41; *Marine Bank v. Wright*, 48 N. Y. (3 Sick.) 1; *First Nat. Bank of Cincinnati v. Kelly*, 57 N. Y. (12 Sick.) 34. So, in the absence of a bill of lading, the intention to vest the property in the goods in the consignee upon the shipment, so as to give him a constructive possession, subject only to the equitable right of stoppage in transit, may be inferred from other documents, such as receipts, or orders, or by the correspondence which has taken place between the parties. *Heard v. Brewer*, 4 Daly (N. Y.), 136; *Philadelphia, etc., R. R. Co. v. Barnard*, 3 Ben. 39. See *Stanton v. Eager*, 16 Pick. (Mass.) 467; *Fragano v. Long*, 4 B. & C. 219; *Brandt v. Boulby*, 2 B. & Ad. 932.

§ 10. **Who is a bona fide holder.** The transfer of a bill of lading must be for value, and not a mere security for an antecedent debt. *Lee v. Kimball*, 45 Me. 172; *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76, 107; and see *Harris v. Heard*, 6 Duer (N. Y.), 606; *Durborrow v. McDonald*, 5 Bosw. 150. And the value must be given in good faith, without notice of any fact or circumstance showing that the indorsement is in fraud of the original vendor. *The Argentina*, 1 L. R., Adm. 370. See *Holbrook v. Vose*, 6 Bosw. (N. Y.) 67, 109. But the mere fact that goods which are *in transitu* were bought on credit and have not been paid for, is no reason why they should not be resold, because this may be the best method of procuring the means to pay, and it may fairly be presumed the bill of lading was transmitted to the purchaser with that view. *Ib.*; *Cummings v. Brown*, 9 East, 506; 2 Sm. Lead. Cas. 890. Notice of the vendee's insolvency, and that the vendor has not been paid, would seem to be sufficient to put third persons on their guard, and render any title that they may acquire by the indorsement of the bill liable to be defeated by a subsequent stoppage. *Ib.*; *The Argentina*, 1 L. R., Adm. 370; *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76, 109. But this can be true only while the transit continues, and has no application after the

cargo arrives. *Stevens v. Wheeler*, 27 Barb. 658. The unpaid vendor cannot, therefore, reclaim his property from an assignee for the benefit of his creditors, who has succeeded in obtaining an actual or constructive possession, although the conduct of the latter shows that he knew that the vendee was insolvent, and did not pay for the goods. *Jones v. Jones*, 8 Mees. & Wels. 431; *Whitehead v. Anderson*, 9 id. 518, 534.

So, it has been held that one who buys or makes advances *bona fide* on the faith of an indorsement of the bill of lading by a fraudulent vendee, will acquire a good title against the original vendor (*Dows v. Greene*, 32 Barb. 493; *Rowley v. Bigelow*, 12 Pick. [Mass.] 387); and this on the ground that sales induced by fraud are voidable, not void, and cannot be set aside to the injury of an innocent purchaser. The principle is said not to apply, however, where the bill of lading itself is procured by deceit or artifice (*Dows v. Perrin*, 16 N. Y. [2 Smith] 325; *Barnard v. Campbell*, 55 N. Y. [10 Sick.] 456, 462); or where the fraud consists in an assertion that the purchaser is acting as agent for a third person, who did not authorize him to buy. *Decan v. Shipper*, 35 Penn. St. 239, 244; 2 Sm. Lead. Cas. 890. But see *Keyser v. Harbeck*, 3 Duer (N.Y.), 391; *Rowley v. Bigelow*, 12 Pick. (Mass.) 387.

§ 11. **Right of vendor or consignor to stop in transitu.** It was settled, as a rule of commercial law, in the important case of *Lickbarrow v. Mason*, 6 East, 21; S. C., 2 T. R. 63; 1 H. Bl. 357; 2 id. 211; 5 T. R. 317, 683, that the right to stop goods while on their way to an insolvent buyer, may be defeated by a sale to a third person, attended by a transfer or indorsement of the bill of lading; and this rule has been frequently recognized since as the established law by the courts, both in England and in this country. See *Gurney v. Behrend*, 3 El. & Bl. 622; *Pennell v. Alexander*, id. 282; *Meyerstein v. Barber*, L. R., 2 C. P. 38; *Newsom v. Thornton*, 6 East, 17; *Jordon v. James*, 5 Ham. (Ohio) 88, 219; *Lee v. Kimball*, 45 Me. 172; *Schumaker v. Ely*, 24 Penn. St. 521; *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76, 109; *Dows v. Greene*, 24 N. Y. (10 Smith) 638. So, the same effect will follow from a loan or advance on the faith of such an indorsement, or from any other transaction which, though not a sale in the ordinary sense of the term, yet places the indorsee in the position and invests him with the rights of a purchaser for value. *Ib.*; *Blossom v. Champion*, 28 Barb. 217; *Lickbarrow v. Mason*, 1 Sm. Lead. Cas. 889. The transfer of the bill of

lading, under such circumstances, gives rise to an equity which is superior to that of the vendor, and may not only preclude the latter from arresting the transit of goods which had been forwarded, but from making payment a condition precedent to the delivery of merchandise which is still in his own keeping. *Ib.*; *Dows v. Rush*, 28 Barb. 157. See *Walter v. Ross*, 2 Wash. (C. C.) 283; *Winslow v. Norton*, 29 Me. 419; *Conrad v. Atlantic Ins. Co.*, 1 Pet. 386.

The assignment of the bill of lading in *bona fide* furtherance of a contract, conferring an interest in the goods for a valuable consideration, has, as it regards the question of stoppage *in transitu*, the same effect at law that an actual delivery of the goods would have had. *Gardner v. Howland*, 2 Pick. 599; *Indiana, etc., Bank v. Colgate*, 4 Daly (N. Y.), 41; *Meyerstein v. Barber*, L. R., 2 C. P. 45; *The Thames*, 14 Wall. 98, 106. But the mere receipt of the bill of lading by the original consignee and vendee and remaining in his hands, unindorsed, does not in any way interfere with or defeat the right of stoppage *in transitu* of the consignor and vendor. *Tucker v. Humphrey*, 4 Bing. 516, 522; *Stanton v. Eager*, 16 Pick. (Mass.) 474; *Scholfeld v. Bell*, 14 Mass. 40.

§ 12. **Who not a holder for value.** A bill of lading, given by the master before the goods are put on board the ship, is held to be fraudulent, and the indorsement of the bill will convey no property in the goods, even to a *bona fide* indorsee (*Lickbarrow v. Mason*, 2 T. R. 63, 75. See *ante*, § 4); and much less if the indorsee knows that the transaction on the part of the consignee is fraudulent and dishonest. Thus, if he connive with the latter in contravening the actual terms of the sale, or the rights of the consignor, he will stand in no better position than the consignee or indorser, and his claim will not be allowed to defeat the consignor's right of stoppage *in transitu*. *Salomons v. Nissen*, 2 T. R. 674; *Cuming v. Brown*, 9 East, 506; *Stanton v. Eager*, 16 Pick. (Mass.) 467, 476.

§ 13. **Pledging.** The mere pledging of a bill of lading by the vendee as a security for a debt does not operate absolutely to defeat the vendor's right of stoppage *in transitu*. *Chandler v. Fulton*, 10 Tex. 2. The vendor may still assert his interest in the goods, subject to the rights of the pledgee, and will be entitled, at least in equity, to the residue, after satisfaction of the pledgee's claim. See *Coventry v. Gladstone*, L. R., 6 Eq. 48; *Spalding v. Ruding*, 6 Beav. 376; *Matter of Westzinthus*, 5

Barn. & Ad. 817. And in England the vendor's right of stoppage *in transitu* is not defeated by a transfer of a bill of lading where the consideration for the indorsement is a pre-existing debt (*Rodger v. The Comptoir D'Escompte de Paris*, 5 Moore's P. C. [N. S.] 538; S. C., L. R., 2 P. C. 393; 8 Eng. R. [Moak's Ed.] 209); though it has been held otherwise in this country. *Lee v. Kimball*, 45 Me. 172.

§ 14. **Lien of shipping agent.** A shipping agent having a lien on the bill of lading of goods which he has shipped, may, if the lien is not satisfied before they have reached their destination, have the goods brought home in order to retain his lien upon them, and is not liable to an action for so doing. *Edwards v. Southgate*, 10 W. R. (Eng.) 528. Where the consideration for the indorsement of the bill of lading by the vendee was the advance of money by the indorsee, it was held that the vendor still retained an equitable right of *quasi* stoppage *in transitu*, subject, however, to the right of the indorsee to be paid his advances. But, if the indorsee has other property of the vendee in his hands, he is bound to repay himself from that; and if he does not, but retains the goods sold for this purpose, the vendor himself acquires a lien on such other property for the price of the goods. *Chandler v. Fulton*, 10 Tex. 2; *Matter of Westzinthus*, 5 Barn. & Ad. 817.

§ 15. **Presentation and production.** The bill of lading should be delivered as soon after its arrival as possible, without reference to the arrival or unloading of the goods. *Barber v. Taylor*, 5 Mees. & Wels. 527. After waiting a reasonable time at a foreign port, and no one having produced the bill of lading, the master may deliver the goods into the keeping of some person until the bill of lading is produced. *Howard v. Shepherd*, 9 C. B. 297; 19 L. J., C. P. 249. See *Green v. Sichel*, 29 id. 213; S. C., 7 C. B. (N. S.) 747.

If A has an equitable title to goods on board a ship, and B, knowing of such title, gets an indorsement of the bill of lading, he cannot recover such goods in an action of trover, but the captain will be justified in delivering the goods to A. *Dick v. Lumsden*, Peake, 189.

§ 16. **How affected or varied by parol evidence.** A bill of lading partakes of the nature both of a receipt and a contract, and, so far as it is a receipt, it has always been held that it was not conclusive but was open to explanation between the original parties. *Bates v. Todd*, 1 M. & Rob. 106; *O'Brien v. Gilchrist*, 34 Me.

554; *The Lady Franklin*, 8 Wall. 325; *The Delaware*, 14 id. 601; *The J. W. Brown*, 1 Biss. 76; *Caftero v. Welsh*, 1 Penn. Leg. Gaz. R. 121. Thus, as to the quantity of goods delivered to a carrier, the bill of lading furnishes *prima facie* evidence only, and is always open to contradiction and explanation by parol evidence, like any receipt. *Abbe v. Eaton*, 51 N. Y. (6 Sick.) 410; *Wayland v. Mosely*, 5 Ala. 480; *Bissel v. Price*, 16 Ill. 408. The rules that should govern it in its character of a receipt have been thus stated in a Massachusetts case:

First. The receipt in the bill of lading is open to explanation between the master and the shipper of the goods.

Secondly. The master is estopped, as against a consignee who is not a party to the contract, and as against an assignee of the bill of lading, when either has taken it for a valuable consideration upon the faith of the acknowledgments which it contains, to deny the truth of the statements to which he has given credit by his signature, so far as those statements relate to matters which are, or ought to be, within his knowledge.

Thirdly. When the master is acting within the limits of his authority, the owners are estopped in like manner with him; but it is not within the general scope of the master's authority to sign bills of lading for any goods not actually received on board. HOAR, J., in *Sears v. Wingate*, 3 Allen (Mass.), 103. And see *Warden v. Greer*, 6 Watts (Penn.), 424; *Portland Bank v. Stubbs*, 6 Mass. 425; *Sutton v. Kettell*, 1 Sprague, 309; *Dickerson v. Seelye*, 12 Barb. 102.

In its character of a contract, a bill of lading is no more open to alteration or explanation by parol than are other contracts. *Wolfe v. Myers*, 3 Sandf. (N. Y.) 7; *The Lady Franklin*, 8 Wall. 325; *Barber v. Brace*, 3 Conn. 9. Thus, if the bill of lading state that the property was to go to Liverpool, the master cannot prove that by verbal agreement it was to be sent to London.

Wolfe v. Myers, 3 Sandf. 7, 13. Nor is parol evidence admissible to prove an agreement that the vessel might deviate (*May v. Babcock*, 4 Ohio, 334); and generally such evidence is inadmissible to vary, in any manner, the terms of the bill of lading in its character of a contract (ib.; *Shaw v. Gardner*, 12 Gray [Mass.], 488; *Cincinnati, etc., R. R. Co. v. Pontius*, 19 Ohio St. 221; *Cox v. Peterson*, 30 Ala. 608; *White v. Van Kirk*, 25 Barb. 16); though it may be admitted in explanation of an ambiguity. See *Chouteau v. Leech*, 18 Penn. St. 224; *Butler v. The Arrow*,

1 Newb. Adm. 59; *Russian Steam Nav. Co. v. Silva*, 13 C. B. (N. S.) 616; *Barnard v. Kellogg*, 10 Wall. 383.

A "clean" bill of lading, that is, a bill of lading which is silent as to the place of stowage, imports a contract that the goods are to be stowed *under* deck. This being so, parol evidence of an agreement that they were to be stowed *on* deck is inadmissible. *The Delaware*, 14 Wall. 579; and see *The Wellington*, 1 Biss. 279. It has been held that the mere delivery by a shipper, without examination, of a bill of lading, limiting the carrier's liability, and expressing on its face that, by accepting it, the shipper agrees to its provisions, after the goods have been actually shipped under a verbal agreement, does not conclude the plaintiff from showing the actual agreement. The rule that prior negotiations are merged in a subsequent written contract does not apply. *Bostwick v. Baltimore, etc., R. R. Co.*, 45 N. Y. (6 Hand) 712; reversing S. C., 55 Barb. 137; *Lamb v. Camden & Amboy R. R. Co.*, 4 Daly (N. Y.), 483. But see *Long v. N. Y. C. R. R. Co.*, 50 N. Y. (5 Sick.) 76; *Hinckley v. N. Y. Cen. & H. Riv. R. R. Co.*, 56 N. Y. (11 Sick.) 429; *Huntington v. Dinsmore*, 6 N. Y. S. C. (T. & C.) 195; S. C., 4 Hun, 66; *Collender v. Dinsmore*, 55 N. Y. (10 Sick.) 200; *Magnin v. Dinsmore*, 56 N. Y. (11 Sick.) 168, in all of which cases the general rule is sustained that where a shipper of property takes from the carrier a bill of lading, receipt or other voucher, expressing the terms and conditions upon which the property is to be transported, the writing, in the absence of proof of fraud or mistake, must be taken as the evidence, and the sole evidence, of the final agreement of the parties, and by it their duties and liabilities must be regulated. Resort cannot be had to prior parol negotiations to vary its terms. See also, *ante*, 525, § 7, and cases cited.

§ 17. **Legal remedies.** An indorsee of a bill of lading has a right, founded on his ownership of the goods, to sustain an action against the owner or master, but he cannot, generally, bring the action on the bill of lading in his own name. See *Thompson v. Dominy*, 14 Mees. & Welsb. 402; *Tindal v. Taylor*, 4 El. & Bl. 219; *ante*, 524, § 6. As a general rule, a suit founded upon the express contract contained in the bill of lading, should be brought by the shipper with whom the master contracted, or by the owner of the goods, in a case where the shipper acted as his agent. *Berkley v. Watling*, 7 Ad. & El. 29. And a consignee or indorser of a bill of lading has not the right to sue upon the special contract, unless he is also the shipper or owner of the

goods, for the obvious reason that otherwise no express contract is made with him. *Anderson v. Clark*, 2 Bing. 20; *Dows v. Cobb*, 12 Barb. 310; S. C., 10 N. Y. Leg. Obs. 161.

If bills of lading are presented to the master by two different holders, and he delivers to one, a right of action against him accrues to the disappointed holder, as it is for the master to inquire who has the best right. *The Tigress*, 32 L. J. (Ad.) 97; 2 Tudor's Lead. Cas. 673.

§ 18. **Equitable remedies.** It has been doubted whether a bill of interpleader would lie at the suit of a captain of a trading vessel against a party claiming, not under, but paramount to, the bill of lading, on the ground that delivery, according to the bill of lading, would fully justify the captain. *Lowe and Richardson v. —*, 3 Madd. 278. In a more recent case, however, it was thought that such a bill would lie, as the right of possession in chattels may be in one person, and the right of property in another. *Warington v. Wheatstone*, Jac. 202.

CHAPTER XXIV.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

ARTICLE I.

GENERAL PRINCIPLES AND DEFINITIONS.

Section 1. In general. Bills of exchange and promissory notes are so much alike, in many respects, that a separate discussion of each subject would lead to a useless repetition. For that reason they will be treated of together, though the peculiarities of each will be pointed out with distinctness. In the first place a definition will be given of the more important terms which are used in relation to bills and notes. In this definition nothing more is intended to be stated than merely to define the terms employed. But in a subsequent place, the rights and duties of the parties to a bill or note will be discussed and illustrated by a reference to the adjudged cases.

A *bill of exchange* is a written order or request by one person to another, for the payment of a particular sum of money at a specified time, absolutely and at all events, to the person named in the bill as payee. *Luff v. Pope*, 5 Hill, 413; 7 id. 577. A bill of exchange is sometimes termed a *draft* in popular language. Both names signify the same thing, and the same rules of law are applicable to the instrument, by whatever name it may be called.

A *promissory note* is a written promise by one person for the payment of money to another person therein named, at another specified time, absolutely and at all events.

A *check* is an inland bill of exchange drawn upon a bank or a banker, and payable to the bearer or to the order of the payee. The giving and presenting of a check for money, deposited for safe-keeping, operates as a demand of the sum specified in it. *Cheney v. Beals*, 47 Barb. 523. A check in the ordinary general form, which does not describe any particular fund, nor use any words of transfer of the whole or any part of the account standing to the credit of the drawer, is in legal effect a bill of exchange, and does not amount to an assignment of the funds of the drawer in the bank drawn upon. *Lunt v. Bank of*

North America, 49 Barb. 221; *Ætna National Bank v. Fourth National Bank*, 46 N. Y. (1 Sick.) 82; 7 Am. Rep. 314. See *ante*, Banks and Banking.

A *bank bill* or *note* is simply a promissory note, made and issued by a bank or a banker, and payable to the bearer on demand.

Bills of exchange are either *foreign* or *inland*; they are foreign when drawn by a person in one State or country upon a person in another State or country, and they are inland, when both the drawer and the drawee reside in the same State or country, and when both drawn and payable in the same State or country, though accepted abroad.

Bills drawn by a resident of one State of the Union upon a resident of another State therein, will be considered a foreign bill, and subject to the rules which are applicable to such bills. Bills and notes are divided into those which are negotiable, and those which are not negotiable. A *negotiable instrument* is one which may be transferred by indorsement, or delivery, so as to give a right of action to the person to whom it is so indorsed or delivered in his own name, and upon the instrument so transferred. The rules of the common law did not permit ordinary unnegotiable choses in action to be assigned by one person to another, so as to authorize an action in the name of the assignee. But the Code, §§ 111, 112, 113, has changed the rule; and now every action must be brought in the name of the person who is the real party in interest.

The term *negotiable instrument* has a definite signification in the law merchant. And the meaning of the term has not been changed by the Code. A note payable in chattels may now be assigned, and the assignee may enforce its collection in his own name; but that fact will not render the note a negotiable one. For all purposes, and as to all the rights of the parties to bills and notes, the law in relation to negotiability remains unchanged, except in the single fact that actions may now be brought in the name of the party interested in them.

In a bill of exchange, there are usually three original parties, the drawer, the payee, and the drawee, who, after acceptance, becomes the acceptor. In a promissory note, there are but two original parties, the maker and the payee. In a bill of exchange the acceptor is in contemplation of law the primary debtor. When a negotiable note has been indorsed by the payee, then there occurs a striking resemblance in the relations of the parties

upon both instruments, although they are not in all respects identical. The indorser of a note stands in the same relation to the subsequent parties to it as the drawer of a bill; and the maker of a note is under the same liabilities as the acceptor of a bill. The *maker* is the principal debtor in a promissory note, who signs it as such on the face of the note, and promises to pay it when due.

The *payee* is the person to whom a promissory note is made payable, or the person in whose favor a bill of exchange is drawn.

An *indorser* is one who writes his name on a bill of exchange, or a promissory note, or other negotiable paper. He undertakes to be responsible to the holder for the amount of the bill or note, if the latter shall make a legal demand of the payer, and in default of payment give proper notice to such indorser. An *indorsee* is the person in whose favor an indorsement is made.

The *holder* of a bill of exchange or of a promissory note is the person who is legally in possession of it, either by indorsement or delivery, or both, and entitled to receive payment either from the drawer or acceptor, or the maker.

The *drawer* is the person who makes a bill of exchange. The *drawee* is the person to whom a bill of exchange is addressed, and who is requested to pay the amount of money therein mentioned.

The *acceptor* is the person who agrees to pay a bill of exchange drawn upon him. *Acceptance* is the act by which the drawee or other person evinces his assent or intention to comply with, and be bound by, the request contained in a bill of exchange to pay the same; or, in other words, it is an engagement to pay the bill when due. An *indorsement* is the act of writing the indorser's name upon the back of a bill of exchange or a promissory note. It also signifies the writing of the indorser.

An illustration of the use of a bill of exchange may render the subject more intelligible. If A, living in New York, wishes to receive one thousand dollars, which await his orders in the hands of B, in London, he applies to C, going from New York to London, to pay him one thousand dollars, and take his draft on B for that sum, payable at sight.

This is an accommodation to all parties, A receives his debt for transferring it to C, who carries his money across the Atlantic in the shape of a bill of exchange, without any danger or risk in the transportation; and on his arrival at London, he presents

the bill to B and is paid. This illustration introduces all the parties to a bill of exchange. A, who draws the bill, is called the *drawer*, B, to whom it is addressed, is called the *drawee*, and on acceptance he becomes the *acceptor*; C, to whom the bill is made payable, is called the *payee*. As the bill is payable to C or his order, he may, by indorsement, direct the bill to be paid to D, and in that case C becomes the *indorser*, and D, to whom the bill is indorsed, is called the *indorsee* or *holder*. It is important to be remembered that the acceptor of a bill of exchange is the principal debtor, while the indorsers are regarded as mere sureties, and even the drawer of the bill is regarded as a mere surety for the acceptor. The maker of a note and the acceptor of a bill are always the principal debtors so far as the holder of the paper is concerned. The holder, however, may recover the amount of the bill of either or all the parties to it, unless he is himself a party, when he may recover against all who are liable on the paper prior to himself, though he cannot recover as against those who become parties to it subsequently to himself, unless there is some special agreement to authorize it.

ARTICLE II.

PARTIES TO A BILL OR NOTE.

Section 1. In general. A bill or note is a contract, and the assent of the parties is as requisite in making such a contract as in making any other. There must be legal capacity to assent or the contract will not be binding. See *ante*, 82. The presumption is that all persons are capable of contracting, unless they are declared incapable by law. The disability or want of legal capacity is an exception to the general rule, and it must be pleaded and established by evidence to be available as a defense to an action on a bill or note.

As a general rule, every person who is capable of making a valid contract in relation to other matters is equally capable of making a valid bill or note. There may be some exceptions to the rule, though they are not numerous. See title Assent, *ante*, 82. An infant's note is voidable. See Infancy. Corporations may make notes if that is necessary to the transaction of their business, and within the scope of their charter. See Corporations. As to notes made by partners, see Partnership.

At common law the note of a married woman is absolutely void. But since the statute, which authorizes her to transact

business on her own account in the same manner that she might do if she were a single female, there cannot be any doubt of her ability to make a valid note or bill, if it is in good faith made and given in the course of the business which the statute authorizes her to transact. Laws of 1860, chap. 90, and as amended, Laws 1862, chap. 172. See Married Women. An agent may make a bill or note for his principal; but he must be careful to keep within the limits of his authority or he will render himself personally liable. *Ante*, 236, 240.

ARTICLE III.

FORMS AND REQUISITES OF BILLS AND NOTES, ETC.

Section 1. In general. A prominent characteristic of bills of exchange, promissory notes and of checks is, that they import an absolute promise or order to pay a specified sum of money to some designated person. And to effectuate the intention of the parties, any promise or order which possesses these requisites will be held to be a valid instrument. *Wells v. Brigham*, 6 Cush. 6; *Coursin v. Tedlie's Adm'rs*, 31 Penn. St. 506; *Arnold v. Sprague*, 34 Vt. 402; *Bates v. Butler*, 46 Me. 387. A bill, though not payable to bearer or order, is still a bill of exchange. *Ib.*

Every valid promissory note requires a competent maker, who can make a valid legal promise to pay the money. So, every bill of exchange must be accepted by a person who is legally capable of making such a contract. There must also be a proper person to whom a note is made payable; and there must not be any uncertainty as to the person to whom it is payable. If no payee is named, or if no person is designated, so that there is no person specified as payee, the note will be void. A note read thus: "I promise to pay to the *secretary for the time being* of the Indian, etc., Society," and it was held void because no person was designated as payee. *Storm v. Stirling*, 3 Ell. & Bla. 832; S. C., *Cowie v. Storm*, 6 id. 333. The principle of this decision is, that the note was not payable to the person who was secretary at the time when the note was made, but to some unknown person who might be secretary at a future time, when the note was payable, which was nine months after date.

A bill of exchange was drawn in this form: "Six months after date pay to the order of *the treasurer for the time being* of the Commercial Travelers' Benevolent Institution, the sum of twenty

pounds for value received." This bill was held to be void, and the court said: "I think the true construction of the instrument is, that the acceptor undertakes to pay the amount to the order of the person whoever he may be, who at the time of the maturity of the bill shall be the treasurer of the institution. I take it, that in order to constitute a valid bill of exchange, it is essential that there should be a drawer, a drawee and a payee; and although the payee need not be expressly designated by name, still it is essential to the validity of the bill, that he shall be a person who is capable of being ascertained at the time the bill is accepted. He cannot be a person who is not ascertainable at that time, consequently, the payee not being an ascertained person at the time of the acceptance, the instrument here sued on is not a valid bill of exchange." *Yates v. Nash*, 8 J. Scott, 581, 586. A written promise to pay "*to the estate of A, deceased.*" and not to any person by name, is not a promissory note. *Lyon v. Marshall*, 11 Barb. 241; see, also, *Tittle v. Thomas*, 30 Miss. 125; *Bennington v. Dinsmore*, 2 Gill. 348.

The cases just cited are distinguishable from any other class of cases which seem to be quite similar. If the note or bill is payable to some person who is designated by name, it will be valid, although payable also to some other person as his successor in office. A note was written in this form: "Twelve months after date, I promise to pay to Joseph M. White, Charles A. Davis and Louis McLane, Trustees of the Apalachicola Land Company, or their successors in office, or order," etc.; and this note was held valid. *Davis v. Garr*, 6 N. Y. (2 Seld.) 124. A note payable to "the administrators" of a particular estate has been held negotiable. *Moody v. Threlkeld*, 13 Ga. 55; *Adams v. King*, 16 Ill. 169. So, if a note payable to "the steamboat Juda and owners, or order." *Moore v. Anderson*, 8 Ind. 18.

In *Davis v. Garr*, there were payees designated by name to whom the note might be paid. And, in case of a change of officers, the note would be in legal effect payable to the successors. The contract was complete and legal at the time when it was made, and if any change subsequently occurred as to the persons to whom it became payable, that would not invalidate the note. And see *The King v. Box*, 6 Taunt. 325. But a note which is payable in the alternative is not negotiable within the statute, as, for instance, if it is made payable to A, or to B and C. *Blanckenhagen v. Blundell*, 2 Barn. & Ald. 417; *Walrad v. Petrie*, 4 Wend. 575; *Musselman v. Oakes*, 19 Ill. 81; *Osgood v. Pearson*,

4 Gray, 455; *Childs v. Davidson*, 38 Ill. 437. Such a note cannot be declared on as a promissory note within the statute. If, however, it purports on its face to be for value received, the setting forth of the note according to its terms is a sufficient statement of the consideration to enable the plaintiff to recover as on a contract. *Walrad v. Petrie*, 4 Wend. 575; *Jerome v. Whitney*, 7 Johns. 321; *Taplin v. Packard*, 8 Barb. 220. So, an instrument thus: "On demand, we jointly and severally promise to pay to W. S. and M., or to their order, or the major part of them, one thousand pounds," is a valid promissory note, upon which the three payees may maintain an action. *Watson v. Evans*, 1 H. & Colt. 662.

The contingency as to the payee must be apparent on the face of the note, or it will not prevent it from being negotiable. *Richards v. Richards*, 2 Barn. & Ald. 447; *Sweeting v. Fowler*, 1 Stark. 106.

The makers of a promissory note, which, in terms, is payable to their own order, and is by them indorsed, thereby contract with whomsoever may be the legal indorsee when it becomes payable, to pay it to him. *Smith v. Gardner*, 4 Bosw. 54. Where a note is made by several persons payable to one of their own number, though payment cannot be enforced at law, as between the original parties, yet if it be indorsed to a third person, he may maintain an action upon it. *Pitcher v. Barrows*, 17 Pick. 361; *Heywood v. Wright*, 14 N.H. 73; *Rambo v. Metz*, 5 Strobb. 108; see, also, *Muldrow v. Caldwell*, 7 Mo. 563; *Murdoch v. Caruthers*, 21 Ala. 785.

In this State it is declared by statute that notes made payable to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect and be of the same validity as against the maker and all persons having knowledge of the facts as if payable to bearer. 1 R. S. 721, § 5, Edm. ed. This statute was made for the purpose of obviating a difficulty in the way of the holder, in making title and suing on a note which had not been indorsed by the person to whose order it was made payable. It applies to cases where the maker, who is also payee, negotiates the note without indorsement. *Plets v. Johnson*, 3 Hill, 115, BRONSON, J. A promissory note was, by its terms, made payable to the makers' own order, but they omitted to indorse it. It was delivered by the makers as a premium note upon an open policy to a marine insurance company. That company was authorized "to negotiate premium notes for the

purpose of paying claims, or otherwise, in the regular transaction of its business." They delivered the note in suit, with others, to the plaintiff, and had them discounted and received the proceeds. A small amount of risks compared with the amount of the note had been taken and premiums earned. The note was to cover premiums to be earned. There was no evidence as to the application of the proceeds of the note by the insurance company. It was held that the note was so negotiated by the makers, by its delivery to the company, as to make it the same in legal effect as if payable to bearer within the statute, that the plaintiffs were *bona fide* holders of the note, and that they were entitled to recover the whole amount of the note, whatever might be the equities or rights between the makers and the insurance company. *Central Bank of Brooklyn v. Lang*, 1 Bosw. 202, and see *Brower v. Hill*, 1 Sandf. 629, 648. A note payable to a fictitious person or firm is recoverable as payable to bearer under the statute, on proof that it was negotiated by the makers. A note which is made payable to a fictitious person or firm, and is negotiated by the makers is valid, and the holder may recover upon it under the statute, in the same manner as though the note had been made payable to the bearer. *Stevens v. Strong*, 2 Sandf. 138; *Plets v. Johnson*, 3 Hill, 112.

Where a note is made payable to the order of the maker, and he transfers it by indorsement, the note is valid and negotiable, and the holder could have recovered upon it even before this statute. *Plets v. Johnson*, 3 Hill, 112; *Smith v. Lusher*, 5 Cow. 688. See *Gale v. Miller*, 54 N. Y. (9 Sick.) 536, 538; *Miller v. Weeks*, 22 Penn. St. 89; *Muldrow v. Caldwell*, 7 Mo. 563.

Where a bill or note is payable otherwise than to the bearer, it must contain the name of the payee. A promise to pay a given sum on demand for value received, without saying to whom, has been held to be mere waste paper. *Douglass v. Wilkeson*, 6 Wend. 637, 644; *Gibson v. Minet*, 1 H. Bla. 609, 610, EYRE, Ch. B. But a note which is made payable to the person who should thereafter indorse it is negotiable. *United States v. White*, 2 Hill, 59.

The court said, page 61: "The maker of a note may bind himself to the bearer generally; and a promise to pay such bearer as shall come to the possession of the note in any given mode is but a more limited exercise of the same power. It is like making a note payable in blank, which may be filled up by a *bona fide* holder with his own name; indeed it is but a more enlarged form

of the ordinary promise to the payee or order, or the order of the payee. If it could have effect in no other way, we should hold it payable to bearer generally, like a bill payable to a fictitious payee or order." A bank check which is made payable "to the order of bills payable," or "to the order of 1658," cannot be passed by an indorsement, and it is, therefore, in judgment of law, payable to bearer. It stands upon the same ground as a check payable to the order of a fictitious person. *Willeys v. Phoenix Bank*, 2 Duer, 121; *Gibson v. Minet*, 1 H. Bla. 569; and see *Leonard v. Mason*, 1 Wend. 522; *O'Donnell v. Smith*, 2 E. D. Smith, 124. To entitle the holder of a note, claiming thereon without the indorsement of the payee, to recover, he must prove affirmatively that the payee is a fictitious person. *Maniort v. Roberts*, 4 E. D. Smith, 84.

A bill or note which is made payable to the order of — may be filled up by any bearer, with his own name, if he can show that he came regularly by it. *Hardy v. Morton*, 66 Barb. 527, 533; *Cratchley v. Mann*, 5 Taunt. 529; *Cruchley v. Clarence*, 2 Maule & Selw. 90; *Atwood v. Griffin*, 2 Carr. & Payne, 368. A United States treasury note is valid although issued with the name of the payee left in blank. *Dinsmore v. Duncan*, 57 N. Y. (12 Sick.) 573. When a bill or note is issued with a blank for the name of the payee, a *bona fide* holder has authority to insert his name in such blank. *Ib.* If a promissory note is made payable to A B, generally, it is *prima facie* evidence of a promise to A B, the father, and not to A B, the son, if the names are the same; but if A B the younger is in possession of the note, he may recover upon it. *Sweeting v. Fowler*, 1 Stark. 106. The words "or order," "or bearer," and "bearer," in notes, bills and checks, are words of negotiability, and the use of either of them makes the paper negotiable, although impersonal words be used in place of naming a payee, and if such words be used it is negotiable by delivery without indorsement. *Mechanics' Bank v. Straiton*, 3 Abb. Ct. App. 269; 5 Abb. (N. S.) 11; 36 How. 190; 3 Keyes, 365; 1 Trans. App. 201. So of a note payable to the "holder." *Putnam v. Crymes*, 1 McMullan's Law. 9.

If a promissory note, not payable to order or bearer, is indorsed by the payee and transferred by him, he may be sued as an indorser of a promissory note. *Bates v. Butler*, 46 Me. 387.

A mistake in the name of the payee, or a misdescription of it, will not invalidate a bill or note, if the evidence leaves no doubt

as to the intended payee. *The King v. Box*, 6 Taunt. 325; *Stevens v. Strong*, 2 Sandf. 138.

An ordinary due bill in the following form: "Due A B one hundred dollars payable on demand," is a valid promissory note within the statute, if signed by the maker. *Kimball v. Huntington*, 10 Wend. 675; *Luqueer v. Prosser*, 1 Hill, 256. Or it is valid if in this form: "Due A B or bearer, one day from date, one hundred dollars, for value received." *Russell v. Whipple*, 2 Cow. 536. So of a due bill thus: "Due A B, or bearer, one hundred dollars, for value received, with interest, at L.'s office in R.," and not specifying any time of payment. *Sackett v. Spencer*, 29 Barb. 180. No time of payment being specified, the law declares it to be payable immediately. *Ib.*

A sealed instrument in the form of a negotiable note is not negotiable. *Helper v. Alden*, 3 Minn. 332. But the affixing of a seal to a bill of exchange does not deprive it of its commercial character. *Bain v. Wilson*, 14 Ohio St. 14. A United States treasury note is not rendered unnegotiable because it is under the treasury seal. *Dinsmore v. Duncan*, 57 N. Y. (12 Sick.) 573.

A written instrument, in the usual form of a bond, but without a seal, is a promissory note within the statute. *Woodward v. Genet*, 2 Hilt. 526; *Lynam v. Califer*, 64 Mo. Cas. 572. So an instrument in these words: "Six months from date I *guaranty* to pay," etc., is a valid note. *Bruce v. Westcott*, 3 Barb. 374. So of an agreement to be *accountable* for a specified sum. *Morris v. Lee*, 1 Strange, 629; S. C., 2 Ld. Raym. 1396; 8 Mod. 362.

An instrument in the form of a bill of exchange, drawn upon a joint-stock bank by the manager of one of its branch banks by order of the directors, may be declared upon as a promissory note. *Miller v. Thompson*, 3 Man. & Grang. 576. So an order drawn by the president of a railroad corporation upon its treasurer, directing the latter to pay A B, or order, a specified sum, stated as being the amount due A B for work done by him as contractor, in building a section of the railroad of the corporation, is in effect a promissory note, and may be declared on as such. *Fairchild v. Ogdensburgh, etc., Railroad*, 15 N. Y. (1 Smith) 337.

A written warrant of a municipal corporation for the payment of a sum certain, at a fixed time, to A or order, stating that it is payable "out of any funds belonging to the city, not before specially appropriated," and "chargeable to the general city fund,"

is a negotiable promissory note. *Bull v. Sims*, 23 N. Y. (9 Smith) 570.

An instrument which promises to pay a specified sum of money to A B, or order, or bearer, is a valid promissory note, although it contains a clause which authorizes the payee or holder to accept or claim something besides money in payment. And, therefore, an instrument by which a railroad corporation promises to pay, at a specified place, to A B, or order, a given sum, with interest, with a privilege of returning the note within a given time, and receiving stock in exchange for it, is a negotiable promissory note. *Hodges v. Shuler*, 22 N. Y. (8 Smith) 114; S. C., 24 Barb. 68.

Bonds issued by a railroad company, whether under its corporate seal or not, payable to A B, or the holder thereof, are negotiable, and will pass by delivery. *Conn. Mutual Life Ins. Co. v. Cleveland, etc., R. R. Co.*, 41 Barb. 9; 36 How. 225; *Brainard v. New York and Harlem R. R. Co.*, 10 Bosw. 332; *Banfield v. Rumsey*, 2 Hun, 112; 4 S. C. (T. & C.) 322.

So of an instrument by which the maker promises to pay to A B, or order, for value received, a specified sum, at the maker's store, four months after date, or in goods on demand. *Hosstatter v. Wilson*, 36 Barb. 307. In these cases the notes promise unconditionally to pay a specified sum of money, and the maker has no option about it, and therefore the promise is not in the alternative so far as the maker is concerned. The fact that the payee or holder has an option to accept payment in something else than money does not change the character of the promise to pay money.

Every bill or note ought to be signed by the drawer or maker. The statute has provided some general rules, which will be given: "All notes in writing, made and signed by any person, whereby he shall promise to pay to any other person or his order, or to the order of any other person, or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland bills of exchange, according to the custom of merchants." 1 R. S. 721, § 1, Edm. ed. "Every such note, signed by the agent of any person, under a general or special authority, shall bind such person, and shall have the same effect, and be negotiable as above prescribed." *Id.*, § 2. "The word 'person' in the two last preceding sections shall be construed to extend to every corporation capable by law of making con-

tracts." Id., § 3. "The payees and indorsees of every such note payable to them or their order, and the holders of every such note payable to bearer, may maintain actions for the sums of money therein mentioned against the makers and indorsers of the same respectively, in like manner as in cases of inland bills of exchange, and not otherwise." Id., § 4. The manner of signing will be discussed hereafter. Where a note is made by an agent, or by one of several partners, the pleadings and evidence ought to show enough to establish that there was sufficient authority to make it, so as to bind the principal or the other partners. *Mitchell v. Ostrom*, 2 Hill, 520. The promise of the maker ought to be unconditional as to all the principals in the note. A note was made in this form: "I, John Corner, promise to pay to Absalom Ferris the sum of fifty pounds, with lawful interest for the same, or his order, at six months' notice. Dated this 24th June, 1808. John Corner, or else Henry Bond." It was held that no action would lie against Henry Bond on this note. The court said: "This is not a promissory note by this defendant within the statute of Anne. It operates differently as to the two parties. It is an absolute undertaking on the part of Corner to pay, and it is conditional only on the part of the defendant, for he undertakes to pay only in the event of Corner's not paying." *Ferris v. Bond*, 4 Barn. & Ald. 679, 681.

A note which contains a promise to pay a sum certain, if the maker's brother does not, within six weeks, is not good as a promissory note. *Appleby v. Biddulph*, 8 Mod. 363. The principle of these decisions is, that the promise of the makers must be an absolute, not a conditional one. But there are other cases in which a party signs his name below the principal, and then adds the word "surety" to his name. Such a note is held to be valid, and an absolute promise to pay the amount to the payee or holder, both as to the principal and as to the person who thus writes "surety" to his name. *Wright v. Garlinghouse*, 26 N. Y. (12 Smith) 539; *Buller v. Rawson*, 1 Denio, 105; *Black v. Caffé*, 7 N. Y. (3 Seld.) 281; *Griffith v. Reed*, 21 Wend. 502. A joint maker of a note who adds to his signature the word "surety," does not limit or change the nature of his liability to the payee or holder. *Inkster v. First National Bank*, 30 Mich. 143. A partnership note may be signed in the name of the firm. But where several persons, who are not partners, make a note, it ought to be signed by each of the individual makers in his own name.

A bill of exchange or a promissory note, to be negotiable under the statute, must be payable in money alone. If made payable in any kind of property, it will not be a negotiable instrument under the statute, although it may be a valid contract, which may be enforced by an action. *Jerome v. Whitney*, 7 Johns. 321. If the bill or note contains a promise to pay a given number of dollars and cents, it is clearly payable in money, because dollars and cents are money. But the cases which have been decided in several of the States, and in England, are not in entire harmony with the decisions made in this State.

A bill or note which is made in this State, and payable here, will not be negotiable if, on its face, it is payable in bank bills which are issued by banks of another State. *Lieber v. Goodrich*, 5 Cow. 186. So, a note made, negotiated and payable here in Canada money, is not a negotiable note within the statute. *Thompson v. Sloan*, 23 Wend. 71, 74. See *Collins v. Lincoln*, 11 Vt. 268; *Kirkpatrick v. McCullough*, 3 Humph. 171; *Faswell v. Kennett*, 7 Miss. 595; *Hawkins v. Watkins*, 5 Pike, 481. A note made in Michigan payable in Canada, in "Canada currency," is payable in money and negotiable. *Black v. Ward*, 27 Mich. 191; 15 Am. Rep. 162. So, it has been held that a note which is payable in *York State bills or specie* is negotiable. *Berry v. Robinson*, 9 Johns. 120; *Chrysler v. Renois*, 43 N. Y. (4 Hand) 209; *Cooke v. Davis*, 53 N. Y. (8 Sick.) 318. And so it has been held of a note payable "in bank notes current in the city of New York." *Judah v. Harris*, 19 Johns. 144; *Lacy v. Holbrook*, 4 Ala. 88; and see *Miller v. Race*, 1 Burr. 457. A check drawn in this State upon a bank in Mississippi, payable in *current bank notes*, is not negotiable. *Little v. Phoenix Bank*, 7 Hill, 359; S. C., 2 id. 425. An order drawn by A in favor of B, upon another, for A's *goods*, or the *proceeds of his goods*, in the hands of the drawer, is not a bill of exchange, nor equivalent to a bill of exchange. *Atkinson v. Manks*, 1 Cow. 692. So, an order drawn by a landlord on his tenant, to pay to a person specified, the rents which had accrued during a certain time, is not a negotiable bill requiring a written acceptance, because it is not for the payment of money only, since it might be payable in something else than money, and besides it is drawn upon a particular fund. *Morton v. Naylor*, 1 Hill, 583.

Bills and notes may be payable in money alone, and may still contain clauses which will render them unnegotiable under the statute. A note which promises to pay money, and also to do

some other act, is not negotiable. A note promised to pay twenty-five dollars to the payee of it ; and it contained this additional clause, "I am to insure one span of colts from my horse to Mr. Cheesebrough's sorrel mares this season, for ten dollars and fifty cents," it was held, that the note was not negotiable, and that any person, other than the payee, who sought to recover upon it must prove an assignment of the note to him. *Austin v. Burns*, 16 Barb. 643. So, an instrument which directs B to pay to C, or bearer, a specified sum, *and take up A's note for that amount*, is not a bill of exchange although accepted in writing by B. *Cook v. Satterlee*, 6 Cow. 108. And a note, in which the maker promises to pay a certain sum of money, at a particular day, and also to deliver up horses and a wharf, is not negotiable. *Martin v. Chauntry*, 2 Strange, 1271. So, a note which agrees to pay a certain sum, with interest, and also to pay a debt of uncertain amount which the payee owed, as part payment of interest, is not negotiable. *Bolton v. Dugdale*, 4 Barn. & Ad. 619. A promise was in writing as follows: "I agree to pay D six hundred and ninety-five pounds at four installments, viz., the first on," etc., "being two hundred pounds," and so on, specifying three others, the four amounting to six hundred pounds; "the remaining ninety-five pounds to go as a set-off for an order of R. to T., and the remainder of his debt owing from D to him;" it was held that this was not a promissory note, for such a note must be entire, and this instrument contained a promise to pay, joined with an agreement to do something else. *Davies v. Wilkinson*, 10 Ad. & Ellis, 98.

A note may be made payable in installments by the terms of the note itself at a specified time, or it may be made payable by installments payable in such sums and at such times as they may be called for, as in the case of notes given for plank road stock or similar instances. *Dutchess Cotton Manuf. v. Davis*, 14 Johns. 238. Stock notes which are given for the formation of insurance companies, and premium notes given when an insurance is made, are familiar instances of notes payable in such installments. Notes which are payable either in money, or in goods, at the option of the maker, are not negotiable, because in such a case the note is not payable in money unless the maker so elect. It is proper to remark here that the mere fact that a bill or note is not negotiable under the statute, does not determine that the note is void.

In all cases in which there is a valid consideration for the note

or bill, and it is in all other respects legal, such note or bill will be valid as a contract, and if properly assigned, may, in this State, be enforced in the name of the person who owns it. *Ante*, 535. The principal importance which is to be attached to the question of negotiability, arises from the rule of law which subjects all unnegotiable bills and notes to any equities which may exist between prior parties, even when they are transferred before due to a *bona fide* purchaser for value. In some cases the rules of pleading require a statement of facts in relation to unnegotiable papers which is not required when delivering upon negotiable instruments. So, too, the evidence may differ in such respects as the pleadings may require.

The essential qualities of a bill or note are, that it be payable at all events, not dependent on any contingency, nor payable out of a particular fund, and that it be for the payment of money only, and not for the performance of some other act or in the alternative. *Cook v. Satterlee*, 6 Cow. 108; *Gillilan v. Myers*, 31 Ill. 525; *Hinnemann v. Rosenback*, 39 N. Y. (12 Tiff.) 98; 6 Trans. App. 257. The amount for which a bill or note is drawn must be made payable *absolutely* and *at all events*, for certainty is a great object in mercantile instruments. *Bunker v. Athearn*, 35 Me. 364; *Hays v. Gwin*, 19 Ind. 19. A promissory note, payable to order, but containing a condition that it shall be given up to the makers as soon as the amount of it is received by the payee, is not negotiable. *Hubbard v. Mosely*, 11 Gray, 170. So a note payable "when any dividends shall be declared" by a specific corporation, is payable on a contingency, and not a negotiable promissory note. *Brooks v. Hargreaves*, 21 Mich. 254. A written promise to pay money, provided the payee shall do a certain thing, is not negotiable paper. *James v. Hagar*, 1 Daly, 517. A promise to pay to the maker's own order "subject to the policy," and indorsed specially to the order of an insurance company, is not negotiable. *American Exchange Bank v. Blanchard*, 7 Allen, 333. It would perplex the commercial transactions of mankind if negotiable securities were issued out into the world incumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to inquire when those uncertain events would probably be reduced to a certainty, and, accordingly, unless they carry their own validity on the face of them, and conform to what is recognized by mercantile custom, they will not be negotiable. *Carlos v. Fancourt*, 5 Term, 482, 485, 486.

An order for a specified sum, "payable ninety days after sight, or when realized," is not a negotiable bill of exchange, as the latter alternative makes the sum payable on a contingency. *Alexander v. Thomas*, 16 Ad. & Ell. (N. S.) 333. A note payable to an insurance company or order, for a sum certain, "and such additional premiums as may become due on a policy, named, and at a time therein specified, is not negotiable. *Marret v. Equitable Ins. Co.*, 54 Me. 537.

An agreement in writing in the form of a promissory note, payable on demand, with interest, contained these additional words: "but no demand is to be made as long as the interest is paid," and it was held that it was not a negotiable promissory note. *Seacord v. Burling*, 5 Denio, 444. No matter what the event may be, on the happening of which payment is to be made, if it be uncertain, it destroys the character and negotiability of the bill or note.

If an order is drawn which is payable out of the proceeds of certain carriages, whenever they are sold (*DeForest v. Frary*, 6 Cow. 151); or if the promise is to pay, provided a certain person, at his death, leaves the maker sufficient to pay with, or if he shall be otherwise able to pay the money (*Roberts v. Peake*, 1 Burr. 323); or if the promise is to pay within a certain number of days after the defendant should marry (*Beardsley v. Baldwin*, 2 Strange, 1151); all such instruments will be unnegotiable. It is immaterial in what language the contingency is expressed, so long as the promise of payment is conditioned upon the happening of an uncertain event. Such an instrument cannot be made payable on a contingency which may never happen; it must be payable at a time certain, or at sight, or at so many days after sight, or, at all events, on the happening of an event which must at some period take place. An instrument by which an individual promises to pay another a certain sum ninety days after a specified partnership is dissolved, and the settlement of the firm books, is not a negotiable note, because it is payable after the happening of two events, one of which, the settlement of the books, may never happen. *Sackett v. Palmer*, 25 Barb. 179. So, where money was to be advanced, by installments, each of which was to be paid as fast as certain portions of work were completed, and the person to whom the money was payable drew an order upon the person who was to pay, and required the order to be paid out of the money which was payable on the second installment, though the work had not been completed so

as to render that installment due, it was held that, although this order was accepted, in general terms, by the drawee, it was not a negotiable bill of exchange; and it was also held, that no action would lie on the instrument if the work was never completed, so as to render the second installment due. *Van Wagner v. Terrett*, 27 Barb. 181.

But where the payment is made to depend upon an event which is certain to occur, though it is uncertain at what particular time it will happen, the bill or note is valid and negotiable. A note which is made payable in a certain number of days after the death of the maker's father is negotiable, since that event is certain to occur, though the precise time when it will take place is uncertain. *Coleman v. Cooke*, Willes, 393; *Cooke v. Colehan*, 2 Strange, 1217. A writing thus: "One day after date, I promise to pay, or at my death, A or bearer," may be sued on as a promissory note. *Conn v. Thornton*, 46 Ala. 587. A note payable thirty days after peace between the Confederate States and the United States does not depend upon a condition, and is valid. *Master v. Edwards*, 20 La. Ann. 236.

And so, a note payable to an infant when he shall come of age, as on the first day of December, 1876, is a valid negotiable note, for it is payable on the day specified, although the infant should die before the time arrives. *Goss v. Nelson*, 1 Burr. 226. It is of no consequence how long the time of payment is postponed, provided the time fixed is certain to arrive, or the event specified is certain to happen. The words used in a bill of exchange ought to imply an obligation to pay the amount named, for an instrument drawn in this form: "Please to let the bearer have seven pounds, and place it to my account, and you will oblige me," not purporting to be a demand made by a party having a right to call on the other to pay, is not a good bill of exchange. *Little v. Slackford*, 1 Mood. & Malk. 171. But a draft in these terms: "Mr. Nelson will oblige Mr. Webb, by paying to T. Ruff or order, twenty guineas on his account," purports to be an order to pay, and is a negotiable bill. *Ruff v. Webb*, 1 Esp. 129. The order to pay need not be in any particular form; any expression amounting to an order or direction is sufficient. The word "*pay*" itself is not indispensable, and any synonymous or equivalent expression is sufficient; as, "*credit in cash*," which means pay in money. *Ellison v. Colingridge*, 9 M., G. & Sc. 570; *Hamilton v. Spottiswoode*, 4 Exch. 200. The payee should be particularly described, so that he

cannot be confounded with another person of the same name, and must be a person who is capable of being ascertained at the time the instrument is made. *Yates v. Nash*, 8 C. B. (N. S.) 581; *ante*, 538. A bill or note must be certain as to the amount to be paid. An order directing a third person to pay for a specified quantity of grain, upon which no price was fixed, is not a negotiable bill, because it does not require the payment of a sum certain. *Lent v. Hodgman*, 15 Barb. 274. So, an instrument by which a party promises to pay to another a sum specified, "and also all other sums which may be due to him," with interest, is not a negotiable note, even as to the sum named. *Smith v. Nightingale*, 2 Stark. 375.

Nor is an instrument which is drawn in the form of a note for the payment of a certain sum, "first deducting thereout any interest or money due to the maker, on any account," a valid negotiable note. *Barlow v. Broadhurst*, 4 J. B. Moore, 471. Nor is a draft drawn upon commission merchants, requiring them to pay to the order of the drawer, in thirty days from date, the sum of one thousand dollars, or what might be due after deducting all advances and expenses, available as a negotiable security. The acceptance being for an uncertain amount, to wit, for the balance of the proceeds of unsold goods, is not negotiable. *Cushman v. Haynes*, 20 Pick. 132.

Bills and notes must not be made payable out of a particular fund; for when so drawn, they become mere special engagements, which are to be treated like other contracts not negotiable. *Munger v. Shannon*, 61 N. Y. (16 Sick.) 251.

An order was drawn upon P., in these words: "Sir, pay to G., etc., or order, three hundred dollars out of the balance that will be due us from the sales of cloths that you now have or may have of us, together with the woolen machinery upon which you have a chattel mortgage, after deducting the amount you have advanced us, with your charges and commissions. M. & H." This order was accepted, as follows: "Accepted, 10th Sept., 1846." In an action upon this acceptance by G., etc., it was held, that the order and the acceptance were made with reference to a particular fund, and that the money was not payable, unless that fund was sufficient to pay the debts, advances, etc., mentioned, as well as the order; and it appearing that no such fund existed, since M. & H. were indebted to P., it was further held that the action could not be maintained. *Gallery v. Prindle*, 14 Barb. 186; and see *Van Wagner v. Terrett*, 27 Barb. 181. So, a promise

in the form of a note, which is payable "out of the net proceeds of ore to be raised and sold from a certain ore bed," is not a negotiable promissory note. *Worden v. Dodge*, 4 Denio, 159; and see *Haydock v. Lynch*, 2 Ld. Raym. 1563; *Jenney v. Herle*, id. 1361. So, an order by a landlord drawn on his tenant, to be paid out of the rent, is not a bill of exchange, and a verbal acceptance by the tenant is valid. *Morton v. Naylor*, 1 Hill, 583. So, where an order was drawn by A, upon B, for the payment of a sum certain to C, as soon as B should receive it out of D's money, and B accepted the order generally, but refused to pay the money thereon; in an action against B, in favor of C, it was held that no action lay upon the instrument, because it was not a negotiable bill of exchange. *Dawkes v. De Lorane*, 3 Wils. 207, 213; and see *Atkinson v. Manks*, 1 Cow. 692. The president of a corporation wrote a letter stating, in substance, that if B, a person in its employ, would make an order on its treasurer for any portion of his salary, and the person in whose favor the order was drawn should file it with the treasurer, the sum would be paid monthly so long as B remained in the employ of the company, and the order "remained unrevoked." B drew an order directing the treasurer to pay N. three hundred dollars, in monthly payments of fifty dollars, and charge the same to his salary account. The order and letter were, for a valuable consideration, delivered to N., who presented them to the treasurer, and by his direction filed them with the cashier. Subsequently, B wrote to the cashier stating, that "if not accepted," he countermanded the order. B remained in the employ of the company for six months thereafter, at a salary of one hundred and eighteen dollars a month. The defendant refused to pay any thing to N., upon B's order, and it was held that no action could be maintained against the corporation. *Shaver v. Western Union Telegraph Co.*, 57 N. Y. (12 Sick.) 459.

Whenever a bill or note is made payable out of a particular fund, and promise of payment is made contingent upon the sufficiency of the fund, and that is inadequate, the promise is not binding. If the fund is sufficient, an action may be maintained upon proper pleadings and evidence, though no action will lie upon it as a mere bill or note, since it is not a negotiable note under the statute. *Wilder v. Sprague*, 50 Me. 354. An order drawn, payable out of a particular fund, is not an assignment *pro tanto* of the fund, unless a consideration was paid therefor. *Alger v. Scott*, 54 N. Y. (9 Sick.) 14.

There is a plain distinction between bills and notes which are payable out of a particular fund, and those which are payable absolutely, but are chargeable to a particular account. A recital in a bill or note that certain collateral securities have been given for the payment of the money specified, does not in any manner affect the validity of the bill or note, or its negotiability. *Fancourt v. Thorne*, 9 Ad. & Ellis (N. S.) 312.

An instrument, which, in its terms and form, is a negotiable promissory note, does not lose that character because it also states that the maker has deposited bonds as a collateral security for its payment, and that he agrees on non-payment of the note at maturity, that they may be sold in a manner, and upon a notice specified, and he will pay any deficiency necessary to satisfy the note, and the expenses of such sale. *Arnold v. Rock River, etc.*, R. R., 5 Duer, 207; and see *Haussoullier v. Hartinck*, 7 Term, 733.

A note in this form is valid and negotiable: "I promise to pay to A, or his order, at three months after date, the sum of one hundred dollars, as per memorandum of agreement." *Jury v. Barker*, 1 Ellis, Bla. & Ellis, 459, 460, and cases in note.

A statement in a written warrant of a municipal corporation for the payment of a sum certain at a fixed time to E. S., or order, that the same is payable "out of any funds belonging to the city, not before specially appropriated," and "chargeable to general city fund," does not deprive the instrument of the character of a negotiable promissory note. *Bull v. Sims*, 23 N. Y. (9 Smith) 570. A bill in the following form: "Messrs. A B & Co., please pay to the order of C D, the sum of five hundred dollars, on account of 24 bales cotton, shipped to you as per bill lading, by steamer Colorado, inclosed to you in a letter, E F," is a negotiable bill of exchange under the statute. *Lowery v. Steward*, 25 N.Y. (11 Smith) 239; affirming S. C., 3 Bosw. 505. The court said, page 511: "The draft in question was in form a bill of exchange. It was an unconditional order upon the defendants, to pay a sum certain therein named, to the order of the payee. Although the account to which it should be charged was mentioned, it was not, by its terms, directed to be paid out of a particular fund. Had it been accepted, it was due immediately, whether the cotton, to account of which it was to be charged, had been sold or not."

It is quite common to specify in a bill the object or purpose for which it was drawn, as well as the account to which it is to

be charged, without intending to make the order to pay either conditional or contingent; and, therefore, a bill in this form is negotiable, when drawn underneath a promissory note: "A B, Esq., please pay the above note, and hold it against me in our settlement, C D." *Leonard v. Mason*, 1 Wend. 522. So, when a bill was drawn payable one month after date, and the drawee was directed to pay to A B, or order, a specified sum, "as his quarterly half pay from June 24, to September 27," which was accepted by the drawee, it was held to be a negotiable bill, and an action sustained against the acceptor. *McLeod v. Snee*, 2 Strange, 762, etc.; 2 Ld. Raym. 1481. A statement of a particular fund in a draft or bill of exchange, if inserted merely as a direction to the drawee how to reimburse himself, will not vitiate it. *Kelley v. Mayor, etc., of Brooklyn*, 4 Hill, 263.

Bills and notes are always written or printed, or these methods are combined, when the instrument is partly printed and partly written. But, when such an instrument is made by filling up a printed form, it is still usually termed a written instrument, and is as valid as a note or bill which is wholly written.

The statute requires that all notes shall be in writing, and signed by the maker or his duly authorized agent. 1 R. S. 721, §§ 1, 2 (Edm. ed.), quoted *ante*, 544.

The mode of writing is not material; it may be in pencil mark, or in ink; on paper, or on parchment, or on any other convenient substitute for paper. *Geary v. Physic*, 5 Barn. & Cress. 234; *Brown v. Butchers and Drovers' Bank*, 6 Hill, 443; *Clason v. Baily*, 14 Johns. 484; *Draper v. Pattina*, 2 Speers (S. C.), 292; *Reed v. Rourk*, 14 Tex. 329; *Closson v. Stearns*, 4 Vt. 11; *Jeffrey v. Walton*, 1 Stark. 267. The signature to a bill or note, or indorsement, may be made by writing the name in full, or by writing a part of it in initials, and the remainder in full, or it will be valid if nothing but the initials of the entire name are employed, if those are written for the purpose of executing the instrument. *Palmer v. Stephens*, 1 Denio, 471; *Merchants' Bank v. Spicer*, 6 Wend. 443. A party signing his name to an instrument with his initials, intending thereby to bind himself, is as effectually bound as he would be by writing his name in full. *Ib.* So a party may use figures instead of his initials, or his name in full; and where a party placed the figures, "1, 2, 8," upon the back of a bill of exchange, by way of substitute for his name, intending thus to bind himself as indorser, it was held to be a valid indorsement, although it appeared that the

indorser could write. *Brown v. Butchers and Drovers' Bank*, 6 Hill, 443. So of a mark in the form of a cross, if made by persons who cannot write their name, and that is a valid signature. *George v. Surrey*, 1 Moody & Malkin, 516. It is usual to have a subscribing witness to such a signature by a mark, though this is not necessary; and the signature may be proved by a witness from inspection, if he has seen the party execute instruments in that manner. *Ib.* A mark is a good signing of a promissory note, although there is no subscribing witness to it. *Willoughby v. Moulton*, 47 N. H. 205; *Shank v. Butsch*, 28 Ind. 19; *Hilborn v. Alford*, 22 Cal. 482. When a signature is made by a mark, it is commonly the case that the writer of the instrument writes the name of the maker and leaves a blank space between the christian and the surname for making the mark between the words, "his mark," etc.

The signature of the drawer or maker of a bill or note is usually subscribed in the right hand corner; but it is sufficient if written in any other part. Thus, "I, J. S., promise to pay," is a sufficient signature to a promissory note. *Taylor v. Dobbins*, 1 Strange, 399; *Sanderson v. Jackson*, 2 Bos. & Pul. 238. It is immaterial on what part of a note the maker's signature is placed, so that he signs it as original maker. *Schmidt v. Schmaeller*, 45 Mo. 502. Without the drawer's signature, a bill payable "to my order," though accepted, is of no force, either as a bill of exchange or as a promissory note. *Stoessenger v. South E. Railway Co.*, 3 E. & B. 553; *Goldsmid v. Hampton*, 5 C. B. (N. S.) 94; *McCall v. Taylor*, 19 id. 301; *May v. Miller*, 27 Ala. 515; *Tevis v. Young*, 1 Metc. (Ky.) 197.

In writing bills and notes it is usual to state the time when, and the place where, they were made. At the common law this is not necessary to the validity of the instrument, and a note is valid in this State without a date or time of payment. *Mitchell v. Culver*, 7 Cow. 336; *Wewel v. Cameron*, 31 Tex. 314. A date to the note is not essential. *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11. When no date is specified, a bill or note will take effect from the time of its delivery, which may be established by evidence. If a promissory note is not dated it will be considered as dated at the time it was made. *Seldonridge v. Connable*, 32 Ind. 375. Where there is no date to a note bearing interest from date, the date of its delivery may be shown, and interest computed from that date. *Richardson v. Ellet*, 10 Tex. 190. But a bill of exchange or a promissory note has no legal inception

or vitality until it is delivered to some person as evidence of a subsisting debt. *Hall v. Wilson*, 16 Barb. 548. If a note is dated, and it is delivered after the time when it is dated, it will be valid from the time of delivery only, and it is to be considered as though drawn on the day when it was delivered. *Lansing v. Gaine*, 2 Johns. 300. But although the date of a note, bill or check is not material to its validity, it is so in respect to its period of payment. It may be ante-dated or post-dated without affecting its legal character as an obligation, but the date determines when it becomes payable. *Godin v. Bank of Commonwealth*, 6 Duer, 76, 82; *Brewster v. McCardell*, 8 Wend. 478; *Pasmore v. North*, 13 East, 517; *Gray v. Wood*, 2 Harr. & Johns. 328; *Richter v. Selin*, 8 Serg. & R. 425.

The payment by a bank of a post-dated check before the day upon which it is dated is a payment in its own wrong, and the money so paid remains to the credit of the drawer. The assignee, in good faith of this fund, may maintain an action against the bank for its recovery. *Godin v. Bank of Commonwealth*, 6 Duer, 76.

A note post-dated, and not negotiated before the day of its date, is recoverable by the indorsee; and its transfer before the day of its date affords no cause of suspicion, so as to put the indorsee on inquiry and subject him to the equities existing between the original parties. *Brewster v. McCardell*, 8 Wend. 478; *Pasmore v. North*, 13 East, 517.

It is customary to date bills and notes on the day they are made, and therefore, in the absence of proof to the contrary, the delivery will be presumed to have been made on that day. *Woodford v. Darwin*, 3 Vt. 82; *Lansing v. Gaine*, 2 Johns. 300. The indorsee, in an action against the maker, may prove that there was a mistake in the date of the note. *Drake v. Rogers*, 32 Me. 524. Although a note bears date on Sunday, it may be shown to have been made and delivered on a different day. *Aldridge v. Branch Bank*, 17 Ala. 45. And though signed on Sunday, if delivered on any other day, it is valid. *Bank of Cumberland v. Mayberry*, 48 Me. 198.

The place where a note or bill was made ought always to be inserted in it, as it is presumptive evidence of the residence of the maker at that place. *Taylor v. Snyder*, 3 Denio, 145; *Galpin v. Hard*, 3 McCord, 394. But the *dating* of a promissory note at a particular place does not make that the place of payment, or authorize a demand to be made at that place for the

purpose of charging an indorser. *Id.*; *Anderson v. Drake*, 14 Johns. 114. The presumption is that a note is payable at the place where it is dated. *Richetts v. Pendleton*, 14 Md. 320.

Where the drawer of a bill of exchange dates it generally, as at "Albany," it is sufficient to send him a notice of dishonor by mail, directed to him at that place. *Mann v. Moors*, Ryan & Moody, 249. Bills and notes are generally superscribed in figures for the amount which is written in the body of the instrument. This is a mere matter of convenience, and ordinarily it is not of any importance to the validity of the instruments. Though there may be instances when such figures may be useful, as, for instance, when the body of the bill or note is left blank as to the amount payable by it. In such a case the blank in the body may be filled up by the holder so as to correspond with the sum specified in the figures in the margin. Where there is a discrepancy between the amount stated in the margin and that mentioned in the body of the instrument, the latter prevails, because the former is a mere memorandum, while the words used in the body of the note constitute the contract. Where the sum intended to be made payable by a note is neither expressed in the body of it, nor in the margin in figures, the holder may fill up the blank for the sum intended. And where a note was intended to be made payable for eight hundred dollars, and the note was properly filled up as a promise to pay "eight," omitting the words "hundred dollars," it was held that the holder might insert those words. *Boyd v. Brotherson*, 10 Wend. 93; and see *Clute v. Small*, 17 id. 238. Where a blank space is left in a promissory note, after the word "at," in the place where the place of payment is usually mentioned, the holder of the note is authorized, by an implied authority, to fill the blank. *Kitchen v. Place*, 41 Barb. 465. If an indorser delivers to the maker a promissory note with the time and place of payment in blank, this will authorize the maker to fill the blanks as to time and place of payment. *McGrath v. Clark*, 56 N. Y. (11 Sick.) 35; 15 Am. Rep. 372; *Gillaspie v. Kelley*, 41 Ind. 158; 13 Am. Rep. 318. But this will not authorize him to add the words "with interest." *Ib.* One who makes and delivers to another a promissory note, perfect in form, except that a blank is left after the word "at," for the place of payment, it carries with it an implied authority to any *bona fide* holder to fill the blank. *Redlich v. Doll*, 54 N. Y. (9 Sick.) 234. A maker of a note for \$300, who leaves a blank which is filled up so as

to read \$320, will be liable for that sum to a *bona fide* holder. *Yocum v. Smith*, 63 Ill. 321; 14 Am. Rep. 120. But if a note is perfect when it is delivered, the holder is not authorized to make any additions to it, even though there is a blank space sufficient to contain the alteration. *Bruce v. Westcott*, 3 Barb. 374; *Morehead v. Parkersburgh National Bank*, 5 W. Va. 74; 13 Am. Rep. 636. There may be an exception to this rule in the case of an evident mistake, as where a sum is agreed upon by a debtor as due from him to his creditor, and the debtor draws a note in which he states the true amount in the margin, in figures, but by mistake the body of the note is filled up with a smaller sum, it was held that the creditor might alter the body of the note so as to make it correspond with the true sum. *Clute v. Small*, 17 Wend. 238; and see *Brutt v. Picard*, Ryan & Moody, 37; *Bruce v. Westcott*, 3 Barb. 374.

The parties to a bill or note may fix upon any time that they choose as the time of its payment. Though, as has been seen, *ante*, 549, such time must not be left to be determined by an uncertain event which may never occur. If the time fixed is certain to arrive, or the event upon which payment is to be made is certain to occur, the note will be valid, although the period fixed for payment may be very remote.

It is not necessary that the precise time of payment should be fixed, if it is made to depend upon the happening of an event which is certain to take place, though the particular time of its occurrence is not certain, *ante*, 550. And there may be instances in which a note is valid, though it is made payable upon the happening of an event which may never take place. The object of requiring a certain time of payment is intended for the advantage of the creditor, and for the purpose of preventing a debtor from delaying payment, or the maturity of his debt. And, therefore, a note is valid even when made payable upon an uncertain event which is within the control of the creditor; as, for instance, where a note is made payable in a given number of days after sight or after demand. *Clayton v. Gosling*, 5 B. & C. 360. It is not necessary that any time of payment should be specified, and in that case the note will be payable immediately. *Thompson v. Ketcham*, 8 Johns. 190; *Herrick v. Bennett*, *id.* 374. Some of the cases hold that a note which does not specify any time of payment is payable on demand. *Porter v. Porter*, 51 Me. 376; *Holmes v. West*, 17 Cal. 623; *Salinas v. Wright*, 11 Tex. 572.

In an action on a bank note payable on demand generally, and not at a particular place, a demand of payment is not necessary before the commencement of a suit. *Haxtun v. Bishop*, 3 Wend. 13. Where a note is payable on demand, with interest, no demand is necessary before bringing an action on it. *Hirst v. Brooks*, 50 Barb. 334; *Wheeler v. Warner*, 47 N. Y. (2 Sick.) 519; 7 Am. Rep. 478. Nor is a demand necessary on a note payable at a particular place; but if, in such a case, the defendant shows that he was ready at the place to make payment, and brings the money into court, he discharges himself from interest and costs. *Haxtun v. Bishop*, 3 Wend. 13; *Wolcott v. Van Santvoord*, 17 Johns. 248; *Fairchild v. Ogdensburgh, etc.*, R. R., 15 N. Y. (1 Smith) 339; *Troy City Bank v. Grant*, Hill & Denio, 119; *Hills v. Place*, 48 N. Y. (3 Sick.) 520; 8 Am. Rep. 568; *Locklin v. Moore*, 57 N. Y. (12 Sick.) 360.

But where a note is payable in specific articles without mentioning any day or place of payment, it is in law payable on demand, and an actual demand is necessary before an action can be maintained. *Lobdell v. Hopkins*, 5 Cow. 516; *Rice v. Churchill*, 2 Denio, 145; *Durkee v. Marshall*, 7 Wend. 312; *Cook v. Ferral's Administrators*, 13 Wend. 285.

In all contracts, including bills and notes, time is to be computed by calendar and not by lunar months, unless otherwise expressed in the instrument. 1 R. S. 563, § 4, Edm. ed.

A promissory note payable on demand, with interest, is a continuing security; an indorser remains liable until an actual demand, and the holder is not chargeable with neglect for omitting to make such demand within any particular time. *Merritt v. Todd*, 23 N. Y. (9 Smith) 28; *Brooks v. Mitchell*, 9 Mees. & Wels. 15; *Barrough v. White*, 4 Barn. & Cress. 325. These cases qualify the old doctrine that a bill or note payable on demand must be presented in a reasonable time in order to charge an indorser. But see *Herrick v. Woolverton*, 41 N. Y. (2 Hand) 581; 1 Am. Rep. 461; *Wheeler v. Warner*, 47 N. Y. (2 Sick.) 519; 7 Am. Rep. 478. And see *post*.

When a bill of exchange is drawn, the theory is that the drawee has in his hands funds of the drawer sufficient to pay the bill, and, therefore, a bill ought to be so drawn as to imply an order to pay the amount specified. *Little v. Slackford*, 1 Moody & Malkin, 171. And if the order shows on its face that there is no right to order the payment of the money, it will not be a bill of exchange. *Ib*.

Foreign bills of exchange are usually drawn in several parts, the whole of which constitute what is called a set. These parts are usually three in number, though there may be more if the parties choose. The drawer usually delivers to the payee three bills of the same tenor and date, each of which should refer to the other parts of the set, and express that payment of it is conditional on the other parts of like "tenor and date" as itself remaining unpaid at maturity. One or more of these parts of the bill may be circulated while another is forwarded for acceptance. A bill of exchange drawn in one State on persons living in another is to be treated, it seems, as a foreign and not as an inland bill. *Wells v. Whitehead*, 15 Wend. 527; *Halliday v. McDougall*, 22 id. 264; *Commercial Bank of Ky. v. Varnum*, 49 N. Y. (4 Sick.) 269.

Payment of any one of the parts of the bill to a holder who is entitled to receive the money is payment of the whole set or the entire bill. *Holdsworth v. Hunter*, 10 Barn. & Cress. 449; *Perreira v. Jopp*, id., note, page 450; *Wells v. Whitehead*, 15 Wend. 527, 528.

When the second of a set of three bills of exchange is protested for non-acceptance, and an action is brought against the indorser, and the plaintiff declares on the first of the set he is not entitled to recover, unless he produces the second of the set which was protested, or accounts satisfactorily for its non-production; the defendant may require its production to guard against a subsequent claim by a *bona fide* holder, or by an acceptor who had paid *supra protest* for his honor. *Wells v. Whitehead*, 15 Wend. 527. Each part of a set ought to refer to all the others, so that the drawer may not be compelled to pay twice over. *Davison v. Robertson*, 3 Dow. 218, 228. To prevent mistakes and double payment, neither party to a bill should pay, unless the part protested is presented and surrendered. For if the drawee pays on receiving the second of the set, the indorser who is not aware of the fact may be misled and be induced to pay again on receiving the first of the set accompanied with notice of the protest. *Durkin v. Cranston*, 7 Johns. 442.

For some purposes all the parts of the set constitute but one bill; but they are not one so that the protest of either is a protest of all, nor so as to dispense with the necessity of suing on that particular bill which has been dishonored. *Wells v. Whitehead*, 15 Wend. 527. Foreign bills must be protested for non-acceptance and non-payment, or the drawer and indorser will be discharged. *Ib.*

ARTICLE IV.

NEGOTIABILITY OF BILLS AND NOTES.

Section 1. In general. When a negotiable bill or note is taken in good faith, and for value, before it is due, the holder may recover the full amount of it without reference to any equities which may exist between prior parties to it. Bills and notes not negotiable are valid instruments; but they are taken subject to all existing equities, even when taken in good faith, for value, and before maturity. It is evident, therefore, that for all commercial purposes, it is important that the holder should know whether the bill or note transferred to him is negotiable, or whether it is unnegotiable. The law has not determined that any particular phraseology shall be employed for the purpose of rendering a bill or note negotiable. If any words are used which indicate that the maker, or any other party to the instrument, intended that it should be negotiable, the law will give effect to that intention, so far as that person is concerned. *United States v. White*, 2 Hill, 59, 62; *Willeys v. Phoenix Bank*, 2 Duer, 121; Chit. on Bills, 218, Am. ed. of 1839. The usual mode of making notes, bills and checks negotiable is by drawing them payable to a particular person, *or order*, *or bearer*, or to the order of the drawer, or to bearer generally. It must be remembered, however, that such negotiable words will not of themselves render every contract a bill or note. It is in those cases only in which they are inserted in an instrument which the law recognizes as capable of possessing negotiable qualities, that they can have the effect of rendering the instrument negotiable. An instrument in the form of a note, payable in money, to a certain person, or order, is not negotiable if a seal is affixed to the maker's signature. *Clark v. Farmers' Manufacturing Company*, 15 Wend. 256. But when by mistake and ignorance a seal was attached to the firm name signed to a note given for value, a recovery was allowed in equity in the same manner as though there had been no seal. *Lynam v. Califer*, 64 N. C. 572. A note payable in chattels is not negotiable though payable to bearer, or to order, because its negotiability is destroyed from the fact that it is payable in chattels instead of money. It is the custom of merchants, adopted into the mercantile code, that renders bills of exchange capable of assignment as they now are; and it is by virtue of the statute that promissory notes are

placed upon the same footing as bills in regard to their negotiability. *Ante*, 544, § 1.

When a bill or note is not made payable to a certain person by name, adding "or bearer," or the words, "or order," it must have inserted into it terms of equivalent import, in order to make it negotiable. It is not necessary that the instrument should be made payable to any person by name, for it will be equally valid if made payable to "the bearer," as bank notes or bills are drawn. All bills and notes which are drawn payable to a certain person or bearer, or to bearer generally, are transferable from person to person without any indorsement whatever. And if the payee of a note payable to him *or bearer* put his name on the back, he may be sued as an indorser, in the same manner as though the note had been made payable to him or order. *Brush v. Reeves*, 3 Johns. 439; *Davis v. Wilson*, 31 Tex. 136; *Bank of England v. Newman*, 1 Ld. Raym. 442. But a note payable to A, or bearer, may be negotiated by delivery only, even though it is indorsed by A. *Wilbour v. Turner*, 5 Pick. 526; *Dole v. Weeks*, 4 Mass. 451. When a note is drawn payable to the person who shall thereafter indorse the same, it is a negotiable note; and the person who writes his name on the back of it becomes liable on it as an indorser. *United States v. White*, 2 Hill, 59.

The makers of a note cannot object that a note was negotiated contrary to its terms, when they themselves put it into circulation; as where a note was made for the purpose of renewing a similar note, and it was made "payable and *negotiable* at the Bank of Ontario," but the makers turned it out in payment of a debt which they owed. *Wardell v. Hughes*, 3 Wend. 414. A direction in a note, making it payable at a given bank, is equivalent to a request to the bank to pay it out of any funds which the maker has in the bank. *Griffin v. Rice*, 1 Hilt. 184, *ante*.

A written instrument for the payment of money upon a contingency may be transferred by delivery merely, although payable "to order." Such an instrument is not negotiable, and no indorsement is requisite to transfer the title. A delivery, with intent to vest in the party claiming under it all the payee's interest, is sufficient. *Loftus v. Clark*, 1 Hilt. 310.

Bills and notes for the payment of money, but without words of negotiability, are valid either at common law or under the statute. *Goshen Turnpike Co. v. Hurtin*, 9 Johns. 217; *Downing v. Backenstoës*, 3 Caines, 137; *Yingling v. Cohass*, 18 Md.

148; *Hackney v. Jones*, 3 Humph. 612; *Fernon v. Farmer*, 1 Harr. 32; *Reed v. Murphy*, 1 Kelly, 236; *Burchell v. Sloccock*, 2 Ld. Raym. 1545; *Smith v. Kendall*, 6 Term, 123. In this State most choses in action are assignable so as to authorize an action in the name of the assignee. This subject will be noticed hereafter in relation to indorsements and transfers of such instruments.

In every negotiable bill or note, it is implied that there is a sufficient valid consideration, and it is not essential that the words "for value received," should be expressed in the instrument. *Kinsman v. Birdsall*, 2 E. D. Smith, 395; *Bank of Troy v. Topping*, 13 Wend. 557, 569; *Townsend v. Derby*, 3 Metc. 363; *Hubble v. Fogartie*, 3 Rich. 413; *Benjamin v. Fillman*, 2 McLean, 213; *Kendall v. Galvin*, 15 Me. 131; *Watson v. Kightley*, 11 Ad. & Ell. 702. The words "for value received" in a chattel note payable in neat cattle, are *prima facie* sufficient evidence of consideration, and on proof of the execution and delivery of the note, the payee is entitled to recover. *Jerome v. Whitney*, 7 Johns. 321; *Walrad v. Petrie*, 4 Wend. 575.

Every note, within the statute, imports a consideration, unless the contrary appears in the note itself; and if the defendant would impeach the note for want of consideration, the burden of proof is on him. *Goshen Turnpike Co. v. Hurtin*, 9 Johns. 217; *Smith v. Poor*, 37 Me. 462; *Coburn v. Odell*, 30 N. H. 540; *Camp v. Tompkins*, 9 Conn. 545; *Middlebury v. Case*, 6 Vt. 165; *Thompson v. Armstrong*, 5 Ala. 383; *Mitchell v. Rome Railroad Co.*, 17 Ga. 574; *Richardson v. Comstock*, 21 Ark. 69; *Gamwell v. Moseley*, 11 Gray, 173; *Hatch v. Traves*, 11 Ad. & Ell. 702.

The words "for value received" when inserted in a bill or note are evidence of money received, and the note is admissible in evidence under the money counts. *Hughes v. Wheeler*, 8 Cow. 77. But the recital in a bill, of value received, and its indorsement, do not estop the acceptor nor the indorser from proving that the acceptance and indorsement were for the accommodation of the drawer, and that the bill had no inception until its usurious discount by the plaintiffs. *Clark v. Sisson*, 22 N. Y. (8 Smith) 312. Where a note is expressed to be for value received, that raises a presumption of a legal consideration sufficient to sustain the promise; but that is a presumption only, and may be rebutted. *Holliday v. Atkinson*, 5 Barn. & Cress. 501. The subject of consideration will be noticed more fully hereafter, and see *ante*, 85, etc.

Bills of exchange usually contain words of advice, specifying to what account the amount directed to be paid is to be charged. And when a statement is made in a bill of a particular fund, out of which the drawee may re-imburse himself; or if it is directed that the amount of the bill shall be charged to a particular account, this will not invalidate the bill. *Kelley v. Mayor of Brooklyn*, 4 Hill, 263; *Bull v. Sims*, 23 N. Y. (9 Smith) 570.

The drawer sometimes gives the drawee a general direction in words like the following: "and charge the same to my account," or directs it to be put to some specific account, as "to the Bedford road assessment." *Ib.* But such words of advice are not necessary to the validity of the bill; and in the absence of them, the drawee has an election as to what account they shall be applied, if there are several to which an application may be properly made. *Laing v. Barclay*, 1 Barn. & Cress. 398. Such words are sometimes considered in determining the construction which ought to be given to the instrument, because they indicate the intention, and frequently serve to explain the relation which exists between the parties, by pointing out the consideration for which they are given, or the credit upon which they are drawn. *Ib.* If a bill contains a direction to charge "as per advice," the drawee has a right to wait for advice before accepting or paying it. If no such words are used, or if the direction is to charge as already advised, or without further advice, there is neither necessity nor propriety in waiting for letters of advice. It is, however, customary to send the drawee a letter advising him of the draft, and describing the bill in a particular manner; and this is a prudent course in order to prevent frauds, and to give the drawee such information as may satisfy him that the bill is drawn in the usual course of business.

A bill of exchange, being an open letter of request for the payment of money, must be regularly addressed to the person upon whom it is drawn; and this is usually done at the bottom, on the left hand of the bill. No one can be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honor. *Polhill v. Walter*, 3 Barn. & Ad. 114, 122; *Nichols v. Diamond*, 9 Exch. 157; see *Lindus v. Bradwell*, 5 C. B. 583. And where a bill was drawn payable to the order of the drawer himself, and directed to himself, but accepted by another person, it was held that no action could be maintained against such acceptor. *Davis v. Clarke*, 6 Ad. & Ell. (N. S.) 16. But where an instrument was drawn, payable to the drawer or

his order, at a particular place, without being addressed to any person by name, and it was afterward accepted by the person residing at the place where it was made payable, it was held that the acceptor was liable in an action upon such instrument as a bill of exchange. *Gray v. Milner*, 8 Taunt. 739. The bill was made "payable at No. 1 Wilmot street, opposite the Lamb, Bethnal Green, London." The court held that since the bill was directed to a particular place, it could not mean any thing except that the person residing there was to accept it; and that by accepting it, such person acknowledged that he was the person to whom it was directed. But see *Davis v. Clarke*, 6 Q. B. 16; *Peto v. Reynolds*, 9 Exch. 410.

An order drawn by the president of a corporation, or by the mayor of a city upon its treasurer, has been held to be a valid bill of exchange, and is properly directed to the treasurer. *Kelley v. Mayor, etc., Brooklyn*, 4 Hill, 263. Or it may be treated as a promissory note under the statute. *Bull v. Sims*, 23 N. Y. (9 Smith) 570. And it has been recently held by the court of appeals, that such an order is not a bill of exchange but a promissory note. *Fairchild v. Ogdensburgh, etc., R. R.*, 15 N. Y. (1 Smith) 337. Where an instrument is made in terms so ambiguous as to make it doubtful whether it is a bill of exchange or a promissory note, the holder may, at his election, treat it as either as against the maker of the instrument. *Edis v. Bury*, 6 Barn. & Cress. 433; *Brazelton v. McMurray*, 44 Ala. 323. The construction which is to be given to bills and notes is similar to that which obtains with reference to other contracts. Bills and notes payable to "order" are transferable by indorsement, while those payable to "bearer" may be transferred by mere delivery. A bill of exchange or a promissory note has no legal inception, however complete it may be in form, until it is delivered to some person, as evidence of a subsisting debt. *Adams v. Jones*, 12 Ad. & Ell. 455; *Machell v. Kinnear*, 1 Stark. 499; *Catlin v. Gunter*, 11 N. Y. (1 Kern.) 368; *Marvin v. McCullum*, 20 Johns. 288; *Burson v. Huntington*, 21 Mich. 415; *Ayres v. Milroy*, 53 Mo. 516. A note delivered in escrow, to take effect upon a condition, takes effect as soon as the condition is performed. *Taylor v. Thomas*, 13 Kans. 217. But the note cannot be delivered to the payee as an escrow, it must be a third person. *Hinshaw v. Dutton*, 59 Mo. 139.

When a bill or note is made and delivered for a legal purpose

to some person as evidence of an existing indebtedness, it then has its inception, if such delivery is absolute.

There may be, however, a conditional delivery of such an instrument, and in a proper case the courts will enforce the condition. And where notes are signed by two persons, one of them a principal debtor, and the other his surety, a declaration by the principal, at the time of the delivery, that such delivery is unconditional, will not entitle the payee to maintain an action against the surety or indorser of the notes. If it appears that the notes were signed by the maker, together with a surety, and indorsed by another person on the express condition that they were not to take effect until a certain arrangement should be consummated, the absolute delivery of the notes by the maker is an unlawful diversion of them from the purpose for which they were made and indorsed; and the payee will obtain no title to them unless he is a *bona fide* purchaser without notice, and for value paid. *Mickles v. Colvin*, 4 Barb. 304. So, in an action by the payee of a check against the drawers, the defendants may show the transaction in which it originated; that its delivery was not absolute but conditional, and that, according to such condition, it was the plaintiff's duty to return it to the defendants, and that they had refused, before suit brought, to do so. *Bernhard v. Brunner*, 4 Bosw. 528.

Where a person is induced to execute negotiable paper by a fraud practiced upon him, there cannot be a recovery upon it, except by a *bona fide* purchaser for value. *Farrington v. Frankfort Bank*, 24 Barb. 554. A party who is induced by fraud to sign a note, or to accept a bill upon the supposition that it is an entirely different contract, is not bound by such signature. *Foster v. Mackinnon*, L. R., 4 C. P. 704; *Whitney v. Snyder*, 2 Lans. 477. A person who signs a note in the belief that it is a contract for service, and who exercises reasonable precaution and prudence to avoid fraud and imposition, is not liable on the note. *Taylor v. Atchison*, 54 Ill. 196; 5 Am. Rep. 118. So of a note signed in the belief that it related to an agency for the sale of a hay-fork. *Gibbs v. Linabury*, 22 Mich. 479; 7 Am. Rep. 675, 685, *note*. See *Walker v. Egbert*, 29 Wis. 194; 9 Am. Rep. 548, 554 *note*; *Briggs v. Ewart*, 51 Mo. 245; 11 Am. Rep. 445, 449, *note*. If his own negligence contributed to the result, and the bill or note is held by a *bona fide* holder, for value, he may recover on the instrument. *Chapman v. Rose*, 56 N. Y. (11

Sick.) 137; 47 How. 13; *Fenton v. Robinson*, 4 Hun, 252; 6 S. C. (T. & C.) 427.

One who becomes surety on a non-negotiable note on the express condition that another person shall be procured as a co-surety, and the latter fails to join, the surety will not be liable, although the note is in the hands of a holder having no notice of the agreement. *Ayres v. Wilson*, 53 Mo. 516. See also *People v. Bostwick*, 32 N. Y. (5 Tiff.) 445; 43 Barb. 9; *Lovett v. Adams*, 3 Wend. 380.

It is of no consequence when or where a bill or note is signed, because it takes effect from the time of delivery, and not from the time of making. *Hyde v. Goodnow*, 3 N. Y. (3 Comst.) 266; *Hall v. Wilson*, 16 Barb. 548. Though the parties may in some cases deliver a note after the time of its date, and by agreement make it relate back to the time of its date for some purposes. But no agreement can give the note an inception; there must be some delivery of the instrument, actual or constructive, before it is an absolute security as a bill or note.

It is not necessary that there should be positive proof of a delivery, because the law will infer a delivery from given facts, and those facts may be established by evidence, and be found by a jury, or by the justice. ‡

In an action upon a negotiable promissory note, payable to bearer, or indorsed in blank by the payee, possession by the plaintiff is *prima facie* evidence that he is the owner of it for a good consideration. *James v. Chalmers*, 6 N. Y. (2 Seld.) 209; S. C., 5 Sandf. 52; *Seeley v. Engell*, 17 Barb. 530; *Smith v. Schanck*, 18 id. 344; *Nelson v. Cowing*, 6 Hill, 336; *Bedell v. Carll*, 33 N. Y. (6 Tiff.) 581. The same rule applies to checks. *Townsend v. Billinge*, 1 Hilt. 353; *Cruger v. Armstrong*, 3 Johns. Cas. 5, and cases in note at end of case; *Conroy v. Warren*, id. 259; and bills of exchange stand upon the same footing. So of railroad bonds. *Wickes v. Adirondack Co.*, 2 Hun, 112; 4 S. C. (T. & C.) 250. Indeed, it may be considered clearly settled, that the actual possession of any negotiable instrument which appears on its face to have been regularly negotiated, is sufficient *prima facie* evidence that the instrument was duly delivered, and that the possessor is its owner in good faith and for value. It is now settled that the legal presumption is that such instrument was delivered and negotiated to the holder before its maturity. *Andrews v. Chadbourne*, 19 Barb. 147; *Pratt v. Adams*, 7 Paige, 616. And evidence that the bill or note was not trans-

ferred to the plaintiff until after the maturity of the paper, does not rebut the presumption that he is a holder in good faith, and for value. *James v. Chalmers*, 6 N. Y. (2 Seld.) 209; *Seely v. Engell*, 17 Barb. 530, 534; *Smith v. Schanck*, 18 id. 344.

Bills and notes are frequently given on the sale of property and the settlement of accounts, etc. And it is a general rule that the giving of a note or bill by the debtor to his creditor for goods sold, or for an existing debt, is not to be regarded as a payment of the indebtedness, unless there is an express agreement that it shall have that effect. *Hill v. Beebe*, 13 N. Y. (3 Kern.) 556, 562, 563, and cases cited; *Hughes v. Wheeler*, 8 Cow. 77; *Burdick v. Green*, 15 Johns. 247; *Tobey v. Barber*, 5 id. 68. This last case is a leading one. See 2 Am. Lead. Cases, 245, 249, and cases. The giving of a bill or note does not extinguish the debt for which it was given; it merely operates to extend the time of payment until the instrument becomes due; and, if it is not then paid, the creditor may sue upon the original demand, though he must be able to produce the bill or note at the trial for cancellation. *Id.*; *Muldon v. Whitlock*, 1 Cow. 290. The acceptance by a creditor of a bill or note made by a third person, on account of the debt, does not satisfy it unless the parties agreed that it should be received as payment. *Noel v. Murray*, 13 N. Y. (3 Kern.) 167; *Hays v. Stone*, 7 Hill, 128; S. C., 3 Denio, 575; *Bill v. Porter*, 9 Conn. 28; *Kelsey v. Rosborough*, 2 Rich. 241; *Gordon v. Price*, 10 Ired. 385; *Smith v. Smith*, 27 N. H. 244; *Howard v. Jones*, 33 Mo. 583; *Devlin v. Chamblin*, 6 Minn. 468; *Morrison v. Welty*, 18 Md. 169; *McCrary v. Carrington*, 35 Ala. 698; *Blunt v. Walker*, 11 Wis. 334; *Jose v. Baker*, 37 Me. 465; *Caldwell v. Fifield*, 4 Zab. 150; *Bassett v. Sanborn*, 9 Cush. 57. The same rule applies to a check, and if it is not paid, the creditor may sue upon the original demand. *Cromwell v. Lovett*, 1 Hall, 56; *Stevens v. McNeill*, 26 Barb. 651; *Tanner v. Bank of Fox Lake*, 23 How. 399; *McIntyre v. Kennedy*, 29 Penn. St. 448. Where a note, bill or check is received on a precedent debt, the presumption is that it was not taken as payment, and the burden of establishing that it was agreed to be so received is upon the debtor. *Noel v. Murray*, 13 N. Y. (3 Kern.) 168. But where such an instrument is received cotemporaneously with the contracting of the debt, the presumption is that it was agreed to be received in payment, and the burden of proving the contrary rests on the creditor. *Id.*; *Whitbeck v. Van Ness*, 11 Johns. 409; *Rew v. Barber*, 3 Cow.

272; *Breed v. Cook*, 15 Johns. 241; *Youngs v. Stahelin*, 34 N. Y. (7 Tiff.) 258; *Randlet v. Herren*, 20 N. H. 102. Where the debtor guarantees a bill, or note or check, which he transfers as part payment, at the time of the creation of the debt, such guaranty is evidence that the creditor did not accept the instrument in payment. *Monroe v. Hoff*, 5 Denio, 360; *Johnson v. Gilbert*, 4 Hill, 178; *Torry v. Hadley*, 27 Barb. 192; *Tyler v. Stevens*, 11 id. 485; *Cardell v. McNiel*, 21 N. Y. (7 Smith) 336. It is of no consequence whether the guaranty is in writing or by parol, or whether it is valid or void. In either case it is evidence that the creditor did not accept the instrument as an absolute payment of his demand; and, therefore, when the time expires for which such instrument extends, and it then is unpaid, the creditor may sue upon the original debt, and cancel such collateral security on the trial. *Ib.* Where the creditor accepts the note of a third person in payment of his debt, whether existing, or one created at the time of a purchase, etc., such note will be a payment and discharge of the debt; or, if it was expressly agreed that such should be the effect of the arrangement. *Johnson v. Weed*, 9 Johns. 310; *Graves v. Friend*, 5 Sandf. 568; *St. John v. Purdy*, 1 id. 9; *Frisbie v. Larned*, 21 Wend. 450; *Willard v. Germer*, 1 Sandf. 50; *New York State Bank v. Fletcher*, 5 Wend. 85; *Abercrombie v. Manly*, 9 Port. (Ala.) 145; *Slocumb v. Holmes*, 1 How. (Miss.) 139; *Cave v. Hall*, 5 Mo. 59; *Watson v. Owens*, 1 Rich. 111; *Mims v. McDowell*, 3 Ga. 182; and see *Tobey v. Barber*, 5 Johns. 68; S. C., 2 Am. Lead. Cases.

Though the delivery of the note of a third person is not a payment of a precedent debt, and merely operates to suspend the remedy upon the original debt, yet, if the holder is guilty of laches, he makes the note his own, and discharges the precedent debt. *Shipman v. Cook*, 1 Green, 251; *Allen v. Clark*, 65 Barb. 563; *Smith v. Miller*, 43 N. Y. (4 Hand) 171; 52 N. Y. (7 Sick.) 545; *Middlesex v. Thomas*, 20 N. J. 39; *Kephart v. Butcher*, 17 Iowa, 240; *Lean v. Friedlander*, 45 Miss. 559. See *Syracuse, etc., R. R. Co. v. Collins*, 57 N. Y. (12 Sick.) 641; 3 Lans. 29.

Where several persons are jointly indebted for goods sold, which are charged to all the debtors, it will not discharge some of the parties from their liability by reason of the making out of a bill against a part of the debtors, and taking a note from them payable at a future time, and giving a receipt in full, if such note is not paid. *Muldon v. Whitlock*, 1 Cow. 290;

Schermerhorn v. Loines, 7 Johns. 311. Where a firm was indebted, and had given a firm note for the amount, and the firm was subsequently dissolved, and after that event one of the partners gave his individual note for a part of the amount, the note of a third person for a portion of it, and paid the balance in money, it was held that this arrangement extinguished the liability of the other partners. *Waydell v. Luer*, 3 Denio, 410; and see *Le Page v. McCrea*, 1 Wend. 164; *Frisbie v. Larned*, 21 id. 450. Whether a note given by one of several partners, upon an express agreement that it shall be received in payment of the firm debt, will discharge the other partners, is not entirely settled. See Edw. on Bills, 194, 195, and cases cited. Where a creditor received from his debtor the business note of a third person, upon an agreement that it should be a full satisfaction of a larger debt, if paid at maturity, but not otherwise, it was held that the creditor, by receiving payment of the note when past due, waived the condition and discharged his original debtor. *Conkling v. King*, 10 N. Y. (6 Seld.) 440.

The discounting of a new note, and the application of the proceeds realized from it to the payment of the former note, extinguishes the old debt and creates a new one. *Fisher v. Marvin*, 47 Barb. 159.

When a negotiable bill or note is delivered to a creditor, it operates as a payment so far that he cannot recover upon the original demand until such instrument is due, and he must then produce and cancel it at the trial before he can recover. *Holmes v. DeCamp*, 1 Johns. 34; *Angel v. Felton*, 8 id. 149; *Raymond v. Merchant*, 3 Cow. 147; *Hughes v. Wheeler*, 8 id. 77; *Burdick v. Green*, 15 Johns. 247; *Miller v. Lumsden*, 16 Ill. 161; *Matthews v. Dare*, 20 Md. 248. Negotiable paper is treated as payment in the manner just mentioned, for the reason that it may be transferred from hand to hand; and if transferred to a *bona fide* holder, for value, before the maturity of the paper, the maker will be liable to pay the amount to such holder; and it is therefore required that the creditor who took it from the debtor shall produce and cancel it at the trial, or show its loss, etc., before he can recover, either upon the original demand or even upon the note itself. *Ib.* See "Lost Note." When a bill or note which is not negotiable is given by a debtor to his creditor, the debtor ought to have the same right to require the production and cancellation of the note. The Code permits an assignment of such instruments, and authorizes the owner of the demand to sue in

his own name (Code, §§ 111, 112, 113), and it provides that actions by assignees shall be without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment. § 112.

Where an action is brought by an assignee in his own name, upon a chose in action not negotiable, the defendant owing such claim cannot set off a demand in his favor, against the plaintiff, as a defense, unless he proves that the claim belonged to him before notice of the assignment. *Soloman v. Holt*, 3 E. D. Smith, 139.

When a creditor accepts a bill or note from his debtor it will operate to suspend the right of action on the original debt until the bill or note becomes due or is dishonored. *Putnam v. Lewis*, 8 Johns. 389; *Herring v. Sawyer*, cited in same case; *Smith v. Applegate*, 1 Daly, 91.

Where goods are sold which are to be paid for by the note of a third person, upon the delivery of the goods, and such third person becomes insolvent before the goods are delivered, the vendor is not compelled to deliver them and take such notes in payment, even though the notes are not entirely worthless. *Benedict v. Field*, 16 N. Y. (2 Smith) 595; S. C., 4 Duer, 154; *Roget v. Merritt*, 2 Caines, 117. But see *Sigler v. Smith*, 4 E. D. Smith, 280, which holds that if the vendor expressly agrees to receive the note of such third person, without recourse to the purchaser, he will be bound by the agreement, even though the maker of the note becomes insolvent before the notes are delivered.

Where goods are sold and the purchaser pays for them by giving the note of a third person which is indorsed by the purchaser, such note will prevent a recovery for the goods on a claim for goods sold; and if the creditor neglects to take proper steps for collecting the note, and he omits to give the purchaser notice of non-payment, the purchaser will be discharged. *Dayton v. Trull*, 20 Wend. 345. So, when a bill of exchange is given in payment for goods purchased, the vendor must take proper steps to present the bill for acceptance, and take proper steps to charge the drawer, or he will be discharged, and the creditor will be compelled to rely on the bill as a means of payment. *Jones v. Savage*, 6 Wend. 658; *Chamberlyn v. Delarive*, 2 Wils. 350; *Smith v. Wilson*, Andrews, 187, 228. The acceptance of a note in payment of a prior debt will not operate as a suspension of the creditor's right of action, if the debtor neg-

lects or refuses to perform all that he engaged to do. And, therefore, where an action had been commenced in the Supreme Court on a book account, and an agreement was made between the parties for a settlement, on condition that the defendant gave his note to the plaintiff for the amount, and paid the costs of the suit, and the defendant gave the note but neglected to pay the costs, it was held that the plaintiff had a right to proceed in the action. *Putnam v. Lewis*, 8 Johns. 389. When a creditor receives an order or draft from his debtor upon a third person, for a given sum, which the debtor alleges is to be due in a few days, and the creditor takes the notes of such third person, payable in six and nine months, he makes the debt his own, and, in case of non-payment of the notes, he cannot call upon the debtor for the amount of the draft. *Southwick v. Sax*, 9 Wend. 122.

Where a debtor gives his own note for money which he has borrowed, and he also delivers to his creditor the note of a third person as a collateral security, the creditor will have no right to take a new note of such third person, and extend the time of payment, and if he takes such new note he releases his debtor from the payment of his note, if the note of such third person was equal to the amount of the loan. *Nexsen v. Lyell*, 5 Hill, 406.

Where the note of a third person is delivered on a debt due, and is received as a conditional payment, if the creditor uses diligence in demanding payment of the note at maturity, and in giving notice of the non-payment so as to charge the indorsers thereon, the liability on the original consideration revives, and the creditor may bring his action upon the original demand. *Hickling v. Hardey*, 7 Taunt. 312; *Mussen v. Price*, 4 East, 147. One who receives a note as a collateral security is bound to use ordinary diligence in its collection. *Roberts v. Thompson*, 14 Ohio St. 1.

In strictness the debt does not revive, for it was not extinguished. The dishonor of the paper merely gives a right of action, which was temporarily suspended during the time such paper was maturing. *Puckford v. Maxwell*, 6 Term, 52.

Forged negotiable paper, whether bills and notes, or bank notes and bills, are no payment, and it will not make any difference to the rule, to show that the person paying such bills supposed that they were genuine. *Markle v. Hartfield*, 2 Johns. 455; *Thomas v. Todd*, 6 Hill, 340; *Baker v. Bonesteel*, 2 Hilt. 397; *Jones v. Ryde*, 5 Taunt. 488. The party receiving such a bill must return it to the person of whom he received it, within a reasonable time

after discovering its worthlessness, or he will have to bear the loss. *Ib.*; *Kenny v. First National Bank of Albany*, 50 Barb. 112. See *Burrill v. Watertown Bank and Loan Co.*, 51 id. 105. So, where bank bills are received in payment, and at the time of such payment the bank which issued the bills has in fact stopped payment and is insolvent, although the failure is not known at the place of payment, the loss falls upon the party paying, and not upon the party receiving the bills. *Lightbody v. Ontario Bank*, 11 Wend. 9; S. C., 13 id. 101; *Townsend v. Bank of Racine*, 7 Wis. 185; *Westfall v. Braley*, 10 Ohio St. 158; *Harley v. Thornton*, 2 Hill (S. C.), 509, note; *Fogg v. Sawyer*, 9 N. H. 365. But it has also been held that the loss falls on the party receiving the bills when neither of the parties knew that the bank had failed. *Bayard v. Shunk*, 1 Watts & Serg. 92; *Young v. Adams*, 6 Mass. 182, 185; *Scruggs v. Gass*, 8 Yerg. 115; *Lowry v. Murrell*, 2 Port. 282; *Ware v. Street*, 2 Head, 609. The rule as to returning such bills is the same as that in relation to forged paper. *Camidge v. Allenby*, 6 Barn. & Cress. 373; *Raymond v. Baar*, 13 Serg. & R. 318. The object in requiring a prompt return of such paper is, to enable each person to act without delay in returning it to the person from whom he received it, and while his memory is fresh in relation to the transaction.

ARTICLE V.

BILLS AND NOTES NOT NEGOTIABLE.

Section 1. In general. Bills of exchange are negotiable by the law merchant without the aid of any statute. And these instruments were in common use as negotiable instruments long before promissory notes.

It is by virtue of the statute that promissory notes are made negotiable in the same manner that bills of exchange are. *Ante*, 544, § 1.

No promissory note is negotiable unless it is made so by statute. We have already seen what instruments are negotiable within the statute. *Ante*, 544. Under the former practice, all actions were required to be brought in the name of the person having the legal interest; while under the present law it is required that all actions shall be brought in the name of the real party in interest. But, under the old law, bills and notes were an exception to the general rule, for any person who held a negotiable bill or note might maintain an action upon it in his own name. This rule, however,

did not extend to bills and notes not negotiable; and, where they were assigned, the action was required to be brought in the name of the assignor, although the suit was prosecuted for the benefit of the assignee, who was the real party in interest. The Code has changed the rule, so far as to require all actions to be brought in the name of the real party in interest in the subject-matter of the action. This rule, of course, includes bills and notes, as well as other causes of action. But the Code does not, in any manner, change the rule in relation to what bills and notes are negotiable, or as to what are not negotiable.

The effect of the change in the law has been to render choses in action assignable, and to authorize an action now, in the name of the assignee, in many cases in which it could not formerly have been maintained.

It is thus evident, that the change in the law which authorizes an action in the name of the party to whom an *assignable* demand has been transferred, is not, by any means, equivalent to rendering assigned demands *negotiable* ones. What are the requisites of negotiable paper, has been partially explained. *Ante*, 538. A brief allusion will now be made to those cases in which it is declared that certain bills and notes are not negotiable. An instrument in the form of a negotiable promissory note, which has a seal affixed to the signature of the maker, is not negotiable. *Clark v. Farmers' Manuf. Co.*, 15 Wend. 256. But a scrawl with a pen, of the letters L. S., at the end of the signature, is not a seal in this State. *Warren v. Lynch*, 5 Johns. 239. Though the printed letters "L. S." in brackets have been held to constitute a seal. *Giles v. Mauldin*, 7 Rich. (S. C.) 11.

A note which is payable in specific articles is not within the statute, and it is, therefore, not negotiable. *Jerome v. Whitney*, 7 Johns. 322. So an order for goods, which is drawn in the form of a bill of exchange, is not a bill of exchange, nor equivalent to such an instrument, and it is not negotiable. *Atkinson v. Manks*, 1 Cow. 692; *Farnum v. Virgin*, 52 Me. 576; *Tibbetts v. Gerrish*, 25 N. H. 41; *Gaulden v. Sheeker*, 24 Ga. 438; *Horton v. Arnold*, 17 Wis. 139; *Gusker v. Eddy*, 11 Gray, 502; *Smith v. Giegrich*, 36 Mo. 369; *Archer v. Clafin*, 31 Ill. 306.

If a note, payable in specific chattels, contains the words, "for value received," the burden of proving a want of consideration is thrown upon the maker, since the law will presume that there was a valuable consideration. In negotiable notes and bills, value is implied in every acceptance or indorsement, but this

rule does not apply to paper not negotiable ; and, therefore, an accepted order, which is payable in merchandise, does not import a consideration. *Jeffries v. Hager*, 18 Mo. 272.

There may be a case in which a note is negotiable, although payable in chattels. And where a note promised to pay a specified sum of money, and it also promised to pay in goods on demand, it was held to be a negotiable note, because it was not optional with the maker to pay in goods, although the payee or holder had such an option, if he chose to exercise it. *Hosstatter v. Wilson*, 36 Barb. 307.

Notes payable in chattels are as valid as though they were negotiable. They are a sort of special contract which is governed by some rules of law which do not apply to negotiable paper. And when chattel notes are assigned, the assignee may enforce them in the same manner that his assignor might have done.

If no consideration is expressed on the face of such notes, it will be necessary to allege one in a complaint upon the note, in the same manner as when declaring upon any other cause of action arising upon contract. It has been seen already, that an assignee takes such a note subject to all equities existing against it at the time of the transfer, or such other equities as may arise before notice of the assignment. *Ante*, 561.

Before noticing chattel notes more particularly, it may be proper to say a few words in relation to instruments in the form of bills of exchange, except that they are payable in chattels. Such instruments are usually called orders for goods.

Where an order of this kind is drawn for a given sum, payable in goods or in the proceeds thereof, it is not a bill of exchange ; and, if the drawee accepts, he is not liable to the payee upon it, unless he has goods, or their avails, sufficient to pay the order ; and the person suing upon it must allege and prove these facts before he can recover. *Atkinson v. Manks*, 1 Cow. 692 ; *Jeffries v. Hager*, 18 Mo. 272.

But, where a person draws such a bill upon his factor, with instructions to pay the amount to the payee out of the proceeds of goods in his hands, after paying prior acceptances, and such factor accepts the bill generally, he is liable to pay the amount to the payee, if such factor had sufficient funds for that purpose, after paying the prior acceptances, notwithstanding the drawer may have owed the factor a sum larger than the amount of the bill. *Maber v. Massias*, 2 W. Bla. 1072. By accepting the instrument generally, the factor estopped himself from claiming

any allowance out of the fund for himself, until the prior acceptances, and the order or bill accepted were paid. So where the owner draws an order upon a person for a portion of his property, which is in the hands of his factor, or a warehouseman, or his agent, and the order is accepted in general terms, the title to the property mentioned in the order passes, and the vendee is entitled to the property. *Gillett v. Hill*, 2 Crompt. & Mees. 530; S. C., 4 Tyr. 290; *Chapman v. Searle*, 3 Pick. 38. An acceptance may be absolute, or conditional. When the acceptance is conditional, and is not to become absolute unless upon the happening of a specified event, the acceptance is not binding, and cannot be enforced until the occurrence of the event. *Swan v. Cox*, 1 Marsh. 176.

But, when the event happens, the acceptance becomes absolute and binding, and it may then be enforced if payment according to the order and the acceptance is refused. *Julian v. Shobroke*, 2 Wils. 9; *Smith v. Abbot*, 2 Strange, 1152.

Where the drawee of an order for goods produces it at the trial, this is evidence of a sale of goods by the drawee to the drawer, and of a delivery of them to the payee, at the drawer's request. In this respect they differ from orders drawn for the payment of money, which, if nothing appears to the contrary, are presumed to be drawn upon funds of the drawer in the hands of the drawee. *Alvord v. Baker*, 9 Wend. 323. Orders for the delivery of goods do not require any acceptance, and are usually satisfied by the delivery of the property on presentation. *Briggs v. Sizer*, 30 N. Y. (3 Tiff.) 647. The holder of such an order may, however, require its acceptance in writing, and, when required, the drawee is bound so to accept. *Ib.*

A landlord, for value received, gave an order on his tenant to pay W. the rents accruing during a certain time, which the tenant, when the order was presented, said he would pay, and the landlord subsequently notified the tenant not to pay, but the latter disregarded the notice and paid the order, and it was held that the tenant did right, and that the landlord's claim for rent was extinguished. *Morton v. Naylor*, 1 Hill, 583. An order of this nature is an equitable assignment of the fund on which it is drawn, and the drawee, when notified of the assignment, must pay accordingly, although there is no formal acceptance either written or verbal. *Ib.* So, where the owners of certain securities assign them in trust to discharge certain specified debts, "the balance to be held subject to their order," and the assignees

accept the trust, and the assignors afterward give an order on them for the balance, of which they are properly notified, it is held that the payee of the order may recover against them to the extent of the balance in their hands, though they have not formally accepted the order, because the acceptance of the trust is in effect a promise to the payee of the order. *Weston v. Barker*, 12 Johns. 276. But an order drawn payable out of a specified fund is not an assignment *pro tanto* of the fund, unless a consideration was paid therefor. *Alger v. Scott*, 54 N. Y. (9 Sick. 14.

There is one important distinction between negotiable bills of exchange, and orders for the delivery of goods, when the owner of them draws an order for their delivery, which is shown to the person who has them in his possession. In the former case the drawee is not liable before he accepts the bill, but in the case of an order for goods, the title to them passes to the payee of the order whether the drawee accepts it or not. The order operates as a transfer of the title. *Briggs v. Sizer*, 30 N. Y. (5 Tiff.) 647. So, when an order is drawn upon a particular fund, as in the case of the rents just mentioned, the title is transferred by the order by way of an assignment, and no acceptance is necessary. But, in all such cases, whether of an order upon a particular fund or that of an order for goods, the payee must show that the drawer had title to the fund, or that he owned the goods, unless the drawee accepts the order, which is an admission of the right of the drawer to the property or the fund. *Lowery v. Steward*, 25 N. Y. (11 Smith) 239; *Gallagher v. Nichols*, 60 N. Y. (15 Sick.) 438; 16 Abb. (N. S.) 337.

Without such acceptance of proof of the drawer's title to the fund or goods, no action can be maintained by the payee or his assignee. It has been seen, *ante*, 561, that negotiable promissory notes for the payment of money differ from chattel notes in relation to negotiability, and as to the equities of prior parties to the paper, or prior holders of it. But there are other points in relation to chattel notes which it is important to understand and to observe in practice. It is a general rule that a party who is bound to render a particular service, or to make a payment in money by a given day, must seek the party to whom the duty or the debt is due. In relation to notes payable in specific articles, the law is well settled upon nearly all important questions. This kind of notes sometimes raises questions as to the time when and the place where they are payable. They may, however, be prin-

cipally reduced to four classes: 1. When the note is made by a mechanic, manufacturer, merchant or producer of the article; 2. When there is no time or place of payment mentioned in the note, whether it is made by a mechanic, etc., or by any other person; 3. When the note is payable on demand, but no place of payment is specified; 4. When the note specifies both the time and place of payment.

First. When a chattel note is made by a mechanic, manufacturer, merchant or producer, and the note does not specify any place of payment, the general rule is, that the payee of the note, or his assignee, must go to the shop of the mechanic, the manufactory or warehouse of the manufacturer, the store of the merchant, or the farm of the producer, and demand the property specified in the note. And in such cases, until a demand is made at such places, no breach of the maker's contract exists, and no action can be maintained against him. The reason of this rule is evident, and the rule itself is a just one. Every person who manufactures or produces articles to sell, or who keeps them for sale as a business, is presumed to have facilities, at those places, for the delivery of the articles which he makes or keeps for sale; and it is also presumed that he will always be properly supplied with such articles as he has promised to deliver, whenever they are called for at such place, while he could not be expected to be so supplied with the articles elsewhere.

A merchant gave a due bill, payable to A or order, for \$2,000, payable in merchandise out of his store, on demand, at a place specified by street and number, in the city of New York, and the goods were to be sold and delivered at a price not more than twenty five per cent above the cost price. It was held that the terms of the note were complied with, by delivering goods at prices twenty-five per cent above cost to the merchant, though that price might be much more than twenty-five per cent above the wholesale market price, at the time of delivering such goods; and also that the merchant was at liberty to continue selling his goods, without replenishing the stock, until demand for delivery in full, for the contract; and that, so long as the merchant retained sufficient goods for that purpose, the other party could not complain that he was left to a selection from an inferior assortment, and goods less marketable than the stock at the date of the contract; and further, that after a reasonable notice by the merchant to the other party, to select his goods at the place named in the note, such party was bound to accept them at any

other reasonably convenient place in the same city, to which they might be removed; and that a subsequent demand, at the original place or elsewhere, for a delivery of the goods at the original place, was ineffectual for the purpose of rendering the maker liable to pay in money. *Buck v. Burk*, 18 N. Y. (4 Smith) 337. Such a contract or note authorizes the person who is entitled to receive the goods, to demand them in parcels. *Ib.* But a refusal to deliver goods to the value of twenty dollars, which had been packed up in boxes for removal, after the notice to the party to call for his pay at the vendor's original location, does not constitute a breach of the contract. *Ib.*

A note, payable in specific articles, may be demanded in parcels; but where an article has been made to order for a customer, such article cannot be properly demanded in payment of the note. *Vance v. Bloomer*, 20 Wend. 196.

Second. When a chattel note is given, and no time or place of payment is specified, the holder of the note must make a demand of the articles at the maker's place of business or sale, before an action will lie upon the note. *Ib.*; *Loddell v. Hopkins*, 5 Cow. 516; *Durkee v. Marshall*, 7 Wend. 312; *Cook v. Ferrall's Admrs.*, 13 id. 285; *Counsel v. Vulture Mining Co., etc.*, 5 Daly, 74.

Where a chattel note specifies a time of payment, but does not mention any place for it, the note is payable at the residence of the creditor, if the articles are portable. *Goodwin v. Holbrook*, 4 Wend. 377. As we have seen, *ante*, the general rule is, that the store of the merchant, etc., is the place of payment, where the contract is silent as to place of payment. But this rule ceases where the contract is modified by collateral circumstances which show that a different place of payment was intended. When the goods are a subject of general commerce, and are purchased in large quantities for reshipment, and the purchaser resides at the place of reshipment, and has at such place a store-house and dock for that purpose, his place of business is ordinarily the place of delivery. *Bronson v. Gleason*, 7 Barb. 472. Where a manufacturer of salt at Liverpool executed a writing as follows: "I have this day agreed with Bronson & Crocker, of Oswego, to sell them one boat load of salt per week, and deliver the same to them, in good order, equal to four hundred barrels each week, from this time to the first of November next," etc.; it was held that, upon the reasonable construction of

the agreement, in connection with the surrounding circumstances, the salt was to be delivered at Oswego. *Ib.*

Where a note is payable in specific articles, which are to be delivered by the maker at the residence of the payee, by a time named, but a timely selection of the articles is to be made by the payee, who makes no selection, though prior to the time for payment he instructs the maker not to send any of the articles until he gives notice of what articles he wants, the maker is not thereby discharged from his liability on the contract. *Gilbert v. Danforth*, 6 N. Y. (2 Seld.) 585. The payee, by such instructions and failure to select, does not lose *his right of selection*, unless the maker, before such right is exercised, has paid the amount of the note in articles of his own selection. *Ib.* Where such a note remained unpaid for two years after it became due, and the payee then named the articles which he required in payment, and demanded them of the maker, it was held that a neglect or refusal by such maker, to comply with the demand in a reasonable time, rendered him liable to pay the amount in money. *Ib.* *

When a chattel note is payable at a particular place, other than the residence of the promisee, it is the duty of the promisor, after making the delivery at that place, to notify the promisee of such delivery, without delay. *Newcomb v. Cramer*, 9 Barb. 402.

Third. Where such a note is payable on demand, a special demand is necessary before an action can be maintained upon it. So a note which is given by one who keeps a saw-mill and lumber yard, for a specified sum, "payable in lumber, at cash price, when called for," without mentioning a day or place of payment, requires a demand at the mill yard, before an action can be maintained. *Rice v. Churchill*, 2 Denio, 145. A demand at the mill yard is sufficient, though neither the maker nor any one authorized to make the payment, is found there. *Ib.* If, upon such demand, the maker be absent, it may be made of any one in charge; and if there be no such person, it may be made publicly. *Ib.* The maker of such an engagement is bound to be at the place of payment at all reasonable hours, prepared to perform the agreement. *Ib.* When a note is made payable in "sawing" lumber at a saw-mill, at a certain time and place, and at the time fixed the maker is absent from the place, and has no one present to do the work, and the payee is in no manner responsible for his absence, the note becomes a money demand. *Schnier v. Fay*, 12 Kans. 184.

Fourth. When a chattel note specifies a time and place of payment, it is the duty of the maker to pay the note at such time and place without any previous demand; and a neglect or refusal to do so will render him liable to pay the amount in money. On a contract for services paid for "out of the store" of a third person, an action may be maintained without proof of a demand of payment at such store. *Braydon v. Poland*, 51 Me. 323. It will be a good defense to show that the goods were ready for delivery at the store mentioned. *Ib.* See *Lochlin v. Moore*, 57 N. Y. (12 Sick.) 360; 5 Lans. 307. Where a note is payable in ponderous articles, at a day certain, but no place of payment is specified, the maker of the note ought, if he desires to make a tender, to seek the payee or holder of the note before the day of payment, and ascertain where he will have the articles delivered; and if a reasonable place is named, he is bound to deliver them at that place. *Burns v. Graham*, 4 Cow. 452. If the note is payable generally, or at a place specified, the articles ought not to be tendered in bulk, mixed and undistinguishable from others of the same kind; but they should be separated and distinguished, so that the payee may know what to take. *Ib.*

When portable articles are to be delivered in payment of a chattel note, on or before a specified day, but no place of payment is specified, the residence of the creditor is the place of payment. *La Farge v. Rickert*, 5 Wend. 187; *Goodwin v. Holbrook*, 4 id. 377. But when such a note is payable on demand, or is payable in articles which are manufactured, etc., by the maker, the note is payable at the maker's place of business, etc. *Ante*, 578.

Where a note which is not negotiable is sued on by any person other than the payee, the possession of the note in court, at the trial, by the plaintiff, is not *prima facie* evidence that the note was transferred to the plaintiff before the action was commenced, as is the rule in relation to negotiable paper. *Barrick v. Austin*, 21 Barb. 241. Notes not negotiable are subject to all equities which could have been enforced against the payee. *Lee v. Swift*, 1 Denio, 565; *Rogers v. Morton*, 12 Wend. 484; *Barrick v. Austin*, 21 Barb. 241.

ARTICLE VI.

GUARANTY OF BILLS AND NOTES.

Section 1. In general. The subject of guaranties in relation to promises to answer for the debt, default or miscarriage of another will be discussed elsewhere.

In all cases of guaranty there must be a principal, and a guarantor or surety. And it is a general rule that the liability of the surety is merely co-extensive with that of the principal. Though there are exceptions to this rule, in the case of infancy, and in other instances in which the principal is not bound by the original contract. But, whenever a principal is discharged from his obligation, by payment, accord and satisfaction, release, or in any other manner, the surety or guarantor is also discharged. This result flows from the nature of the contract. A guarantor merely undertakes to pay the debt of another in case he does not pay it, and whenever the principal debt is paid or discharged, the surety is released from his liability. A renewal of a debt, by taking a new note from the principal, discharges the surety or guarantor, since the debt which he guaranteed is canceled.

A guaranty is a special contract, and the guarantor is not in any sense a party to the note. *Lamorieux v. Hewit*, 5 Wend. 307; *Ellis v. Brown*, 6 Barb. 282; *Miller v. Gaston*, 2 Hill, 188, 190.

A contract of guaranty, though indorsed upon a negotiable note and drawn in general terms warranting its *collection*, is not of itself negotiable; because the statute which makes promissory notes negotiable, is not extended to any other instrument relating to the note. *Lamorieux v. Hewit*, 5 Wend. 307; *post*. See *Smith v. Starr*, 4 Hun, 123; 6 S. C. (T. & C.) 387.

Before the enactment of the Code, an action could not have been maintained upon a guaranty in the name of any other person than that of the person to whom it was given. *Ib*.

But a contract of guaranty, although not negotiable, is nevertheless assignable, when it is so drawn as to be available in the hands of any person who may hold the note upon which it is indorsed.

Where a general guaranty is written upon a negotiable promissory note, and the note is transferred, the sale and delivery of the note, with the guaranty upon it, furnishes *prima facie* evidence of the sale of the contract of guaranty. And the posses-

sion of the note and the guaranty is *prima facie* evidence of a right in the holder to the guaranty, and will authorize him to maintain an action thereon, unless it be shown that the contract of guaranty was not transferred at the time the note was transferred. *Cooper v. Dedrick*, 22 Barb. 516; and see *McLaren v. Watson's Ex'rs*, 26 Wend. 425; S. C., 9 id. 557. But when a subsequent holder of a promissory note sues upon a guaranty indorsed thereon, claiming that the guaranty passed to him on the transfer of the note, it is competent for the guarantor to show that it was not the intention of the parties that the guaranty should accompany the note on the transfer of the latter to the plaintiff, but that, on the contrary, it was expressly agreed that he should take the note at his own risk. *Gallagher v. White*, 31 Barb. 92. S. made a note payable to W., or bearer, W. transferred the note to B., in part payment for a piano, at the same time guaranteeing its collection by an indorsement upon the back thereof. S. failed to pay the note at maturity, and W. took it up from B. W. subsequently transferred the note to the plaintiff, who expressly agreed to take the same at his own risk. Through inadvertence, however, the guaranty was not erased at the time of the transfer; it was held that the guaranty was a contract between W. and B., and that when W. paid the amount of the note to B. and took it up, the guaranty was extinguished, having performed its office, and that the plaintiff could not maintain an action against W. upon such guaranty. *Ib.*

Where a guaranty warrants the payment and collection of a note to the payee or holder, or bearer, and it is indorsed upon a negotiable promissory note, such guaranty is negotiable, and an action could have been maintained in the name of the owner of the note, upon such guaranty, even before the Code. *Ketchell v. Burns*, 24 Wend. 456; *Miller v. Gaston*, 2 Hill, 188. No notice of dishonor or non-payment is necessary in the case of a guaranty, as is required by the rules relating to an indorsement. *Brown v. Curtiss*, 2 Comst. 225; *Allen v. Rightmere*, 20 Johns. 365. A guarantor and the principal debtor may be sued jointly, if the principal and the guarantor are both bound by the same instrument. Code, § 120; *Carman v. Plass*, 23 N. Y. (9 Smith) 286. See *Cridler v. Curry*, 66 Barb. 336; 44 How. 345; *Field v. Van Cott*, 5 Daly, 308; 15 Abb. (N. S.) 349.

But it has been held by the supreme court; that where a guaranty and the principal debt are written on different papers, the principal and the surety cannot be sued together. *De Ridder v.*

Schermerhorn, 10 Barb. 638; *Allen v. Fosgate*, 11 How. 218; *Barton v. Speis*, 5 Hun, 60.

The terms of a guaranty must be complied with before the guarantor can be rendered liable upon the contract. *Henderson v. Marvin*, 31 Barb. 297. And where a guaranty for the payment of goods to a specified sum was given, on a credit of six months, and the goods were furnished, but the vendor subsequently extended the time of payment for a part of the amount, and shortened the time as to the other portion of the debt, and took the note of the principal therefor, it was held that the surety was discharged. *Ib.*

Where the person to whom a guaranty is given is bound to do some act before there is any liability on the part of the guarantor, such person must show that he has performed the act, or he cannot maintain an action against the guarantor. *Eddy v. Stanton*, 21 Wend. 255; *Taylor v. Bullen*, 6 Cow. 624; *Nelson v. Bostwick*, 5 Hill, 37. In case of a guaranty, the obligation to prosecute the principal debtor within a reasonable time, and with due diligence, is a condition precedent to the liability of the guarantor. *Gallagher v. White*, 31 Barb. 92; *Craig v. Parkis*, 40 N. Y. (1 Hand) 181. A request to prosecute the principal debtor, when he is insolvent at the time of the request, and so remains, is not sufficient to discharge the surety. *Field v. Cutts*, 4 Lans. 195.

Guarantees are sometimes expressed in the form of letters of request. Such letters are general or special. They are general when addressed to any or to all persons, without naming any one in particular. They are special when addressed to one person or firm in particular, by name. When addressed to all persons, a letter is in effect a request made to any person to whom it may be presented, and any individual may accept and act upon the proposition contained in it, and when he does so, that which was before indefinite and at large, becomes definite and fixed; a contract immediately springs up between the person making the advance and the writer of the letter, and it is thenceforward the same thing in legal effect as though the name of the former had been inserted from the beginning. *Birckhead v. Brown*, 5 Hill, 642, 643, per BRONSON, J.; S. C., 2 Denio, 375; *Union Bank v. Coster*, 1 Sandf. 563; S. C., 3 Comst. 203. A general letter of credit authorizes any person to whom it is presented to act upon the proposition therein contained; and when any person does act thereon, a contract arises between him and

the maker of the instrument, in the same manner as though it had been addressed to him by name. *Union Bank v. Coster*, 3 Comst. 203 ; S. C., 1 Sandf. 563 ; *ante*, 81, 98.

But where a letter of credit is special, and is addressed to a particular person or firm, no other person than the one to whom it is addressed can maintain an action upon it, although he may have advanced the money upon it. *Birckhead v. Brown*, 5 Hill, 634 ; S. C., 2 Denio, 375. Such letters are not negotiable. *Ib.*

There must be a consideration for such letters as well as for any other contracts. But where a letter of credit is issued, the request which it contains is sufficient consideration if the money is advanced on it. *Union Bank v. Coster*, 3 Comst. 203 ; S. C., 1 Sandf. 563, and see *ante*, 81, 98.

ARTICLE VII.

INDORSEMENT AND TRANSFER OF BILLS AND NOTES.

Section 1. In general. The negotiability of bills and notes constitutes a most important part of the instruments. It is this quality which principally distinguishes a bill of exchange or promissory note from ordinary contracts. By the general rules of the common law, choses in action were not assignable. But bills of exchange were an exception, and were assignable at common law. Promissory notes, however, were not negotiable under the rules of the common law, but they now are, and for a long time they have been assignable by virtue of statutes enacted for that purpose. The term "assignable," as it has been just employed, is synonymous with the word "negotiable."

Negotiable bills and notes are payable to the bearer of them, or to the order of the payee named therein. At any rate they must have terms of negotiability to render them negotiable. And, when they are negotiable within the rules of law, they may be transferred from hand to hand so as to give the indorsee or holder a right of action in his own name, as against any or all of the antecedent parties to the instrument.

There are many cases in which a chose in action is assignable, so as to authorize an action in the name of the assignee, if he is the real party in interest ; but this fact does not by any means render the right of action which is so assigned, a negotiable instrument.

Where a bill or note is payable to a person named, or to *bearer*,

a transfer of the instrument may be made by a mere delivery without any writing. And where a note is payable to B, or bearer, it may be negotiated by delivery only, even though indorsed by B. *Wilbour v. Turner*, 5 Pick. 526; *Dole v. Weeks*, 4 Mass. 451. But where it is made payable to a specified person, or his order, it must be indorsed by the payee to render it negotiable. *Harrop v. Fisher*, 10 C. B. (N. S.) 196; *Heston v. Williamson*, 2 Bibb, 83; *Russell v. Swan*, 16 Mass. 314. The payee of a note may transfer it by an indorsement in pencil marks. *Classon v. Stearns*, 4 Vt. 11.

A bill or note payable to the order of the payee may be assigned without indorsement; but if thus assigned, instead of being transferred by a proper indorsement, the assignee will take the paper subject to all equities, in the same manner as though the instrument were not negotiable, or as though it were over due. *Billings v. Jane*, 11 Barb. 620; *Hedges v. Sealy*, 9 id. 214; *Houghton v. Dodge*, 5 Bosw. 326; *White v. Brown*, 14 How. 282; *Haskell v. Mitchell*, 53 Me. 468; *Whistler v. Foster*, 14 C. B. (N. S.) 248. If a note payable to bearer be indorsed by the payee, he will be liable as an indorser. *Davis v. Wilson*, 31 Tex. 136.

The transfer of a bill or note is a contract, and there must be capacity and assent, to render the transfer valid. *Ante*, 82, Assent, etc.

Where a note is payable to a corporation, or its order, and the note is indorsed by the president of the corporation, and it is then delivered to the indorsee, it is necessary for the latter to prove the authority of the president to indorse the note, so as to transfer the title, when he sues on it, and the indorsement is denied in the pleadings. *Marine Bank v. Clements*, 3 Bosw. 600; 31 N. Y. (4 Tiff.) 33. A general resolution sufficiently broad to cover the transaction will be sufficient evidence of the president's authority; it is not necessary to show an authority for that particular transfer. *Elwell v. Dodge*, 33 Barb. 336; see *Belden v. Meeker*, 2 Lans. 470; 47 N. Y. (2 Sick.) 307; *Nelson v. Eaton*, 26 N. Y. (12 Smith) 410. The contract of an infant is voidable, and not absolutely void. He may, therefore, indorse a bill or note so as to transfer the title, though he would not be estopped from avoiding the liability of an indorser, by pleading his infancy. *Nightingale v. Withington*, 15 Mass. 272; *Sebel v. Tucker*, 8 B. & S. 833.

By the rules of the common law, bills and notes belonging to

the wife at the time of the marriage, or at any subsequent time, belonged to her husband, and he was the proper person to indorse them. But the statute law of the various States has abrogated these common-law rules. And a married woman now has as absolute a title to her property, including bills and notes, as she would have if she had remained a single woman. See Laws of N. Y. 1848, chap. 200, and as amended, 1849, chap. 375; Laws of 1860, chap. 90; as amended, 1862, chap. 172. As the law now stands, a married woman is the proper person to indorse a bill or note which belongs to her, and which is payable to her order. And when it is her property, and it is payable to herself, or bearer, she is the proper person to transfer it by delivery. In short, all bills and notes which belong to her should be indorsed or transferred by her in the same manner as though she were an unmarried woman. See *Married Women; Husband and Wife*.

On the death of the holder or payee of negotiable bills or notes, his executor or administrator becomes vested with the title, and he has the right and power to transfer them by an indorsement, or by a delivery, when that is sufficient. *Rawlinson v. Stone*, 3 Wils. 1; S. C., 2 Strange, 1260; and see 2 Burr. 1225. An administrator may indorse and transfer a note payable to his intestate, and the indorsee may maintain an action on the note in his own name. *Cahoon v. Moore*, 11 Vt. 604; *Griswold v. Barnum*, 5 id. 269; *Morse v. Clayton*, 13 Sm. & Marsh. 373; *Cryst v. Cryst*, 1 Smith (Ind.), 370. Such indorsement is valid, and may be enforced in any other State. *Graw v. Hannah*, 6 Jones (Law), 94. A transfer of a note due to an estate by an administrator, in payment of his own debt, gives to the assignee with notice no right of recovery. *Scott v. Searles*, 7 Sm. & Marsh. 498.

Where a bill or note belongs to a person, and it is in his possession at the time of his death, no person but his executor or administrator can transfer the title to it to a third person. *Ib.*; *Lounsbury v. Depew*, 28 Barb. 44; *Heidenheimer v. Wilson*, 31 id. 636; *Edwards v. Campbell*, 23 id. 423. Executors and administrators hold the bills and notes of the testator, or intestate, in a representative capacity; and consequently, each of them represents the deceased, and the act of each is binding upon the estate when he transfers such bills or notes. A transfer by one of several executors or administrators is as valid as a transfer by all of them. *Bogert v. Hertell*, 4 Hill, 492; S. C., 9 Paige, 52; and see *Meakings v. Cromwell*, 1 Seld. 136; *Murray v. Blatchford*, 1 Wend. 583. But the right to indorse a bill or note for

the purpose of transferring it does not include the power to indorse notes generally so as to bind the estate. And where an executor or administrator assumes to bind the estate by giving a note as executor or administrator, he must be careful to employ language which shows that the note is payable out of the assets of the estate, or that he makes the note in a representative capacity; or he will be personally liable to pay it. *Childs v. Monins*, 2 Brod. & Bing. 460; *Powell v. Graham*, 7 Taunt. 580; *King v. Thom*, 1 Term, 487. Administrators who have given a note for the debt of their intestate cannot be made personally responsible for its payment, unless it is shown that they have assets, or that forbearance was the consideration of the note. *Bank of Troy v. Topping*, 9 Wend. 273. A note given by an executor or administrator is *prima facie* evidence of assets, though the presumption may be rebutted, and it may be shown that there was a deficiency of assets. *Bank of Troy v. Topping*, 13 Wend. 557; see *Sims v. Stillwell*, 3 How. (Miss.) 176; *Rucker v. Wadlington*, 5 J. J. Marsh. 238. One who signs an order "A B, administrator," with nothing to show or designate the deceased person or estate, will be personally liable as drawer. *Tryon v. Oxley*, 3 Iowa, 289. Transfers of bills and notes by corporations, or to them, are of frequent occurrence. An indorsement of a note by the holder, in these words: "Pay to E. O., cashier, or order," made upon the purchase of it by the bank of which E. O., was cashier, is a legal transfer of the note to the bank. *Waterliet Bank v. White*, 1 Denio, 608. An officer of a corporation, to whose order, as such, a note executed to it is payable, and who indorses the note, adding to his name his official character, and negotiating it on behalf of the corporation, is not personally responsible as indorser. The effect of such an indorsement is merely to transfer the paper. *Babcock v. Beman*, 11 N. Y. (1 Kern.) 200; S. C., 1 E. D. Smith, 593; *Mott v. Hicks*, 1 Cow. 513. A bill drawn payable to an individual as cashier, is in judgment of law, payable to the bank of which he is an officer. *Bank of New York v. Bank of Ohio*, 29 N. Y. (2 Tiff.) 619. An assignee of an insolvent estate, who indorses a note as "assignor" in the transfer of a note belonging to the estate, is not personally liable. *Bowne v. Douglass*, 38 Barb. 312. An indorsement of a bill or note usually operates as a transfer of the instrument, and it also constitutes an agreement by the indorser to pay the instrument transferred upon certain conditions. But an indorsement may be so framed as to exclude any liability on the part of the

indorser. And, when it is evident from the indorsement, that no personal liability was assumed, none will be enforced by the law. It is upon this principle that an officer of a corporation is not liable upon an indorsement for the mere purpose of transferring a bill or note belonging to the corporation, when the transfer is made exclusively for the benefit of such corporation. So, the same rule applies when a note is indorsed by an agent, and the instrument shows on its face that he was a mere agent. *Hicks v. Hinde*, 9 Barb. 528; *Mott v. Hicks*, 1 Cow. 514; *Babcock v. Beman*, 11 N. Y. (1 Kern.) 200; *Hood v. Hallenbeck*, 7 Hun, 362.

The right to transfer a bill or note is usually vested in the payee named in the instrument. By making the note, or by accepting the bill and issuing it, the maker and acceptor assert to the world that the payee is competent to negotiate and assign the paper; and they will not be afterward permitted to gainsay the assertion so made. The general rule in relation to the transfer of bills and notes is, that no one but the payee or the person legally interested in the instrument can convey the title by an indorsement. *Canal Bank v. Bank of Albany*, 1 Hill, 287; *ante*, 587. But where the payee named in a bill of exchange is a stranger to the transaction, and he has no interest in it, nor any knowledge of it, his indorsement is not necessary, if the drawer forges the signature of such payee to the indorsement, and then puts the bill into circulation. In such a case the drawer of the bill is liable upon it to the person who discounted it, or to any *bona fide* holder thereof; and if the drawee pays the money upon it to a bank which holds the bill for collection, he cannot recover back the amount paid. *Coggill v. American Exchange Bank*, 1 Comst. 113. But in such a case, if the payee is a *bona fide* owner of the bill, and his signature to the indorsement is forged, and the drawee or acceptor pays the money to one who holds the bill under this forged indorsement, the payment will be made at the risk of the drawee, and he will be compelled to pay the amount of the bill to the payee, whose title is unimpaired by the forgery. *Canal Bank v. Bank of Albany*, 1 Hill, 287.

The drawee of a bill of exchange is bound to ascertain that the person to whom he makes payment is the genuine payee, or is authorized by him to receive it. It is no defense against such payee, that the drawee in the regular course of business and with nothing to excite suspicion, paid the bill to a holder in good faith and for value under the indorsement of a person bearing

the same name as the payee. *Graves v. American Exchange Bank*, 17 N. Y. (3 Smith) 205; *Mead v. Young*, 4 Term, 28; *National Park Bank v. Ninth National Bank*, 46 N. Y. (1 Sick.) 77; 7 Am. Rep. 310. The rule that the payee must first indorse a note is founded upon the fact that he alone can transfer it; when there is no transfer of the note, the reason of the rule fails, and it is therefore inapplicable. *Waterbury v. Sinclair*, 26 Barb. 455; 25 How. 591, *n.* And where a note was made by D. payable to W., or order, and before the delivery thereof to the payee, it was indorsed by S., to enable D. to obtain credit with W.; it was held that S. was liable as indorser to the payee, upon proof of presentment, non-payment and notice. *Ib.* It was also held that it was not necessary that there should be an indorsement by the payee, in order to perfect his rights. *Ib.*

The names of all the parties to a bill or note ought to be plainly written; and where there are two or more persons of the same name in a place, some description of the person ought to be given, for the purpose of identifying the real person intended. The omission will not prejudice, if the proper person is ascertained. An indorsement may be made in pencil mark, and by the initials instead of the full name, if the indorser chooses to write his name in that manner. *Ante*, 554, 586.

Since the enactment of the Code, a mere holder of a negotiable promissory note, who has no interest in it, cannot now, as he might formerly, maintain an action in his own name upon it. If the plaintiff's name does not appear upon the instrument, it is essential for him to show in some way the connection between himself and the note, as that it has been indorsed or transferred to him, or that he is the holder or owner of the note. Code, §§ 111, 113, 162; *Lord v. Chesebrough*, 4 Sandf. 696; *White v. Brown*, 14 How. 282.

Where the payee or holder of a negotiable bill or note intrusts it to an agent for the purpose of negotiating it, or permits him to deal with it as his own, if the agent fraudulently transfers it to a *bona fide* purchaser for value and without notice of the defect in the agent's title, such *bona fide* holder will hold the note in preference to the real owner. *Stalker v. McDonald*, 6 Hill, 93. An indorsee of a negotiable promissory note, who receives it in the usual course of business, without notice that it was made for a specific purpose, or of any equities between the parties, is a holder in good faith, and if he takes it as a collateral security, he will be deemed a holder for value. *Bank of New*

York v. Vanderhorst, 32 N. Y. (5 Tiff.) 553. See *Weaver v. Barden*, 49 N. Y. (4 Sick.) 286; *Platt v. Beebe*, 57 N. Y. (12 Sick.) 339.

But if such note or bill is taken by a person who does not pay value, or by one who has knowledge of the facts as to the title, he will not hold it as against the true owner. *Spear v. Myers*, 6 Barb. 445; *White v. Springfield Bank*, 1 id. 225; *Stewart v. Small*, 2 id. 559; *Goldsmid v. Lewis County Bank*, 12 id. 407; *New York Exchange Co. v. De Wolf*, 3 Bosw. 86; *Farrington v. Frankfort Bank*, 24 Barb. 554. When negotiable paper is transferred to an agent for a special purpose, which is plainly expressed in the indorsement, such paper cannot be transferred so as to prejudice the rights of the true owner. An indorsement thus, "pay to A B for my use," or "pay to C D; or order, for my use," is sufficient notice that the paper is the property of the indorser, and not that of the indorsee. *Snee v. Prescott*, 1 Atk. 245, 249; *Attwood v. Munnings*, 7 Barn. & Cress. 278; *Sigourney v. Lloyd*, 8 id. 622; *Eddie v. East India Co.*, 2 Burr. 1227; *Ancher v. Bank of England*, 2 Doug. 637. When a bill upon the face of it purports to be accepted per procuration, that circumstance is notice to any party who takes the bill, that the acceptor has but a limited authority, and the holder cannot maintain an action against the principal if the authority has been exceeded. *Stagg v. Elliott*, 12 C. B. (N. S.) 373; *Alexander v. Mackenzie*, 6 id. 766. But where a person permits another to act as his general agent, he is bound by a contract made by the agent, although the latter declares himself to be acting "by procuration," and has received special instructions, which he exceeds. *Smith v. McGuire*, 3 Hurlst & Norm. 554.

When a bill or note is made payable to several persons, or when it is indorsed to more persons than one, who are not partners, all of the payees or indorseees must unite in transferring the instrument. *Carwick v. Vichery*, 2 Doug. 653, n.; *Snelling v. Boyd*, 5 Monroe, 172. But where a promissory note is made payable to the order of A and B, and is indorsed A and B by one of the payers, with the sanction and approval of the others, this is a sufficient indorsement, although there is no such firm as A and B. *Cooper v. Bailey*, 52 Me. 230.

But when a note is made payable to a firm, or when a note is indorsed to a firm, either of the partners has authority to transfer the instrument by an indorsement of the partnership name. *Cumpston v. McNair*, 1 Wend. 457, 463. Or by an indorsement

in his individual name. *Everit v. Strong*, 5 Hill, 163; S. C., 7 id. 585; *Alabama Co. v. Brainard*, 35 Ala. 476. After the dissolution of a partnership, all the partners must unite in the transfer of a partnership security, in order to vest the title in the transferee. *Geortner v. Trustees of Canajoharie*, 2 Barb. 625; *National Bank v. Norton*, 1 Hill, 572; *Sanford v. Mickles*, 4 Johns. 224.

Upon the death of one of the partners in a firm, the survivor is entitled to the possession of the accounts, notes, bills, etc., and he has authority to collect all demands due to the firm. *Ante*. And in such a case, the survivor is the proper person to indorse and transfer a bill or note which belonged to the firm at the time of the death of such partner. His indorsement will transfer the title; though the survivor cannot create liabilities against the representatives of the deceased partner.

A general assignment made by an insolvent debtor for the benefit of his creditors, transfers the legal title to the assignee; and he is the proper person to indorse bills or notes which are thus assigned. A bill or note may be transferred before it is due, or after that time. But there is one important difference in relation to the time of the transfer, since a note which is transferred after it becomes due, subjects the party taking it to all the equities which exist at the time of the transfer, while a transfer of a negotiable bill or note before it is due, for value and in good faith, entitles the holder to recover irrespective of any prior equities. *Ante*, 561.

A bill or note does not lose its negotiable character by being dishonored, and the indorsement, although made after dishonor, follows the nature of the original contract, and is negotiable, unless it contains express words of restriction. *Leavitt v. Putnam*, 3 Comst. 494. But in such a case the note cannot be presented, at maturity, by the indorsee, and the contract of the indorser then is to pay on demand of the maker, his neglect or refusal to pay, and notice to the indorser, within a reasonable time after the transfer. *Ib.*; *Mutford v. Walcot*, 1 Ld. Raym. 574; *Berry v. Robinson*, 9 Johns. 121; *Van Hoesen v. Van Alstyne*, 3 Wend. 75, 79.

The fact that a bill has been protested does not prevent its subsequent acceptance by the drawee. *Stockwell v. Bramble*, 3 Ind. 428. And such acceptance after the time of payment is binding. *Williams v. Winans*, 2 Green, 239. A drawee who accepts after the bill has been indorsed over is liable to the indorsee.

Bank of Louisville v. Ellery, 34 Barb. 630; *First National Bank of Portland v. Schuyler*, 7 J. & Sp. 440; *Mechanics' Bank v. Livingston*, 33 Barb. 458.

A transfer, as well as an acceptance of a bill of exchange, supposes the existence of the bill transferred or accepted; but a blank indorsement will operate as a transfer of a bill not yet drawn; and it is no objection to the validity of a bill that the acceptance was written before the bill was filled up. *Mitchell v. Culver*, 7 Cow. 336; and *Mechanics' Bank v. Schuyler*, in note; *Schultz v. Astley*, 2 Bing. N. C. 544; *Russel v. Langstaffe*, Dougl. 514. The legal presumption is, that a bill or note was indorsed at the time it was made, or before it became due, unless there are circumstances to show to the contrary. *James v. Chalmers*, 6 N. Y. (2 Seld.) 209; *Pinkerton v. Bailey*, 8 Wend. 600. The law of the place where an indorsement is made is the law which controls the rights and regulates the duties of the parties to the bill or note. *Aymar v. Sheldon*, 12 id. 439; *Everett v. Vendryes*, 19 N. Y. (5 Smith) 436. When a bill or note is payable to bearer, or to a certain person or bearer, no indorsement is necessary for the purpose of transferring the title to the instrument. But where it is payable to order, or to a certain person or order, a written indorsement is necessary, in order to render the bill or note available as a negotiable security in the hands of the indorsee.

It has been seen that such a bill or note may be assigned without a written indorsement, but the title is that of an assignee, and not that of an indorsee. *Ante*. Indorsements are usually made in something like the following forms:

1. *Indorsement by drawer or payee in blank*, "James Atkins."
2. *Like, by a partner*, "Atkins & Co.," or, "For self and Thompson, James Atkins."
3. *Like, by an agent*, "Per procuration, James Atkins, John Adams;" or, "As agent for James Atkins, John Adams."
4. *Qualified indorsement, to avoid personal liability*, "James Atkins, sans recourse;" or, "James Atkins, with intent only to transfer my interest, and not to be subject to any liability in case of non-acceptance or non-payment." *Post*.
5. *Indorsement in full or special*, "Pay John Holloway, or order, James Atkins."
6. *Restrictive indorsement in favor of indorser*, "Pay John Holloway, for my use, James Atkins;" or, "Pay John Holloway, for my account, James Atkins."
7. *Restrictive indorsement in favor of indorsee or a*

particular person only, "Pay G. S. only, James Atkins;" or, "The within must be credited to A B, James Atkins."

An indorsement of a note without recourse passes it with all its negotiable qualities. *Epler v. Funk*, 8 Penn. St. 468; *Rice v. Stearns*, 3 Mass. 225.

The indorsement of a bill or note in blank or in full, without restriction or qualification, passes the interest and property therein to the indorsee. And every such indorsement is an undertaking or agreement that the bill or note shall be duly honored, and that, if it is not, and the indorser has due notice of the dishonor, he will pay the amount to the indorsee. And a right of recovery accrues against the indorser, as soon as the bill or note becomes due, on compliance with the conditions precedent to his liability, namely, making due presentment for payment, and giving to the indorser due notice of non-payment; or, in the case of a foreign bill, having it duly protested, and notice thereof given to the antecedent parties. *Rouquette v. Overmann*, L. R., 10 Q. B. 525. It is not necessary that any particular phraseology should be employed in making an indorsement, which, in that respect, is similar to the rule in relation to the words used in the body of the instrument. *Ante*, 538.

An indorsement which is made by merely writing the indorser's name on the back of the bill or note is the most concise contract that can possibly be drawn. The word "indorsement" imports a writing upon the back of the instrument. But the law does not regard the mere etymological signification of the word, when the object and intention of the parties is evident. And, consequently, an indorsement is valid although written across the face of the bill or note, instead of being written on the back of it. *Yarborough v. Bank of England*, 16 East, 6; *Herring v. Woodhull*, 29 Ill. 92. And the indorsement is equally valid if written upon a separate piece of paper, which is attached to the instrument. This piece of paper is called an *allonge*, and is considered to be a part of the instrument to which it is attached. *French v. Turner*, 15 Ind. 59; *Crosley v. Roub*, 16 Wis. 616.

When an indorser simply writes his name on the back of a negotiable bill or note, it is called an indorsement in blank, or a blank indorsement. When the indorsement mentions the name of the person in whose favor it is made, it is called an indorsement in full, or a full indorsement. Each of these modes of indorsement has its advantages, and the indorser will follow that mode which is most likely to subserve the purposes for which

the indorsement is made. After an indorsement in full, no one but the indorsee or person to whom it is ordered to be paid can demand its payment; and moreover, he himself cannot transfer the bill or note as negotiable paper in any other manner than by adding his own indorsement in writing. *Burdick v. Green*, 15 Johns. 247. This mode of indorsement is frequently adopted among business men, to insure safety in the transmission of negotiable paper. Thus, where a bill is drawn in Buffalo on a person who resides in New York, and it is necessary for the payee to send the bill to New York by mail for collection, he can do so without incurring any danger from its being lost or stolen on the way, by indorsing it specially to the order of his correspondent in the city where it is payable.

On the other hand, where the payee of a bill of exchange, or of a negotiable promissory note, indorses it in blank, the instrument is transferable by a mere delivery, for there is no difference between a note indorsed in blank and one payable to bearer. Where a bill or note is indorsed in blank, and it is lost or stolen during the course of its transmission from one place to another, and it is afterward transferred by the thief to a *bona fide* holder for value, he will hold it in preference to the owner who transmitted it. *Peacock v. Rhodes*, Doug. 633; and see *Miller v. Race*, 1 Burr. 452; 1 Smith's Lead. Cases, 808-826, 7th Am. ed. and authorities there cited.

The holder of a note indorsed in blank may fill it up, before or at the trial, with what name he pleases. *Williams v. Matthews*, 3 Cow. 252; *Lovell v. Evertson*, 11 Johns. 52. A full or special indorsement is generally written thus, "pay A B, or order." But an indorsement in these words, "pay the within to A. Thatcher, value received," has been held not to restrict the negotiability of the instrument, though made after it has been dishonored. *Leavitt v. Putnam*, 1 Sandf. 199; S. C., 3 Comst. 494.

The indorsement follows the nature of the original note, which being itself negotiable, a direction by the payee to pay it to any person named, is a direction to pay it to such person or his order, according to the tenor of the note itself. *Ib.* To render an indorsement restrictive, it is necessary that it should contain express words of restriction. *Ib.* *Epler v. Funk*, 8 Penn. St. 468; *Rice v. Stearns*, 3 Mass. 225. Where a bill of exchange is sent to an agent for collection, and solely for that purpose it is indorsed to such agent in full, and he returns it to the owner protested, he may strike out the indorsement and bring an action

on the note in his own name. *Chautauqua Co. Bank v. Davis*, 21 Wend. 584; *Bank of Utica v. Smith*, 18 Johns. 230. In such a case it is not necessary that there should be a re-indorsement by the agent. *Ib.* The legal effect of an indorsement of a promissory note in blank cannot be varied or changed by a cotemporaneous parol agreement. *Bank of Albion v. Smith*, 27 Barb. 489; *Skillen v. Richmond*, 48 id. 428. The undertaking of an indorser may be either limited or enlarged, at the time it is entered into, by express terms, at the pleasure of the indorser. *Ib.* But, if no such terms are expressed in the indorsement, the law fixes the character of the undertaking, and it cannot be varied by parol evidence. *Ib.* And, therefore, in an action against an indorser, on a blank indorsement, the plaintiff will not be allowed to prove that, at the time the defendant sold and indorsed the note to him, it was agreed by parol that the plaintiff need not make any demand of the maker when the note should mature, but that the defendant would be bound to pay without such demand. *Ib.*; *Seabury v. Hungerford*, 2 Hill, 80. A verbal condition cannot be annexed to a promissory note. *Potter v. Earnest*, 45 Ind. 416.

Where a person indorses his name in blank upon the back of a negotiable note, his contract cannot be changed by parol evidence, so as to charge him as a guarantor. *Ib.*; *Griswold v. Slocum*, 10 Barb. 402, and cases cited. But where the indorsement is made upon a note not negotiable, and the indorser cannot be held liable in that capacity, he may be charged as a guarantor, if that was the intention of the parties, at the time when the indorsement was made. *Ib.* An indorsement in blank cannot be changed into any other contract than that of indorser, and the indorser cannot be charged as maker of the note nor as guarantor. *Dean v. Hall*, 17 Wend. 214; *Hall v. Newcomb*, 3 Hill, 233; S. C., 7 id. 416; *Seabury v. Hungerford*, 2 id. 80; *Ellis v. Brown*, 6 Barb. 282; *Cottrell v. Conklin*, 4 Duer, 45; *Spies v. Gilmore*, 1 Comst. 321; *Moore v. Cross*, 19 N. Y. (5 Smith) 227. Where one who is not the payee of a note writes his name on the back of it before its delivery, he is an original promisor, or a surety, and not an indorser. *Malbon v. Southard*, 36 Me. 147; *Sargeant v. Robbins*, 19 N. H. 572; *Hawkes v. Phillips*, 7 Gray, 284; *Perkins v. Barstow*, 6 R. I. 505; *Peckham v. Gilman*, 7 Minn. 446; *Baker v. Block*, 30 Mo. 229; *Carpenter v. Oaks*, 10 Rich. (Law) 17; *Webster v. Cobb*, 17 Ill. 459; *Cecil v. Mix*, 6 Ind. 478; *Fear v. Dunlap*, 1 G. Greene, 331; *Carr v. Rowland*, 14 Tex.

275; *Riggs v. Waldo*, 2 Cal. 485. An indorser of a non-negotiable note may be held as guarantor or maker. *Richards v. Warring*, 4 Abb. Ct. App. 47; 1 Keyes, 576; *Griswold v. Slocum*, 10 Barb. 402; *Cromwell v. Hewitt*, 40 N. Y. (1 Hand) 491; *Houghton v. Ely*, 26 Wis. 181; 7 Am. Rep. 52.

Where a negotiable note is indorsed in blank by the payee, it becomes assignable by delivery, and a subsequent holder can strike out all the indorsements except the first one, and make title under that; and he may do this, notwithstanding the bill or note may have upon it subsequent indorsements in full. *Water-vliet Bank v. White*, 1 Denio, 608; *Dollfus v. Frosch*, id. 367; *Pentz v. Winterbottom*, 5 id. 51; *Havens v. Huntington*, 1 Cow. 387; *Williams v. Matthews*, 3 id. 252.

So, when a person indorses a bill of exchange to another, whether for the purpose of collection or for value, and the bill afterward comes to his possession again, he will be regarded as a *bona fide* holder, unless the contrary shall appear in evidence, and he is entitled to recover, notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back from either of such indorseees, whose names he may strike from the bill or note, as he may think proper. *Mottram v. Mills*, 1 Sandf. 37, 41, 42; *Dugan v. United States*, 3 Wheat. 173; *Norris v. Badger*, 6 Cow. 449, 455; *Dollfus v. Frosch*, 1 Denio, 367, 373. The payee or indorsee of a bill or note, who has the absolute property in it, may make a restrictive indorsement, which will preclude the person in whose favor it is made from making such a transfer of it as will give a right of action against either the person making the indorsement or any of the antecedent parties. *Snee v. Prescott*, 1 Atk. 245, 249; *Sigourney v. Lloyd*, 8 Barn. & Cress. 622, 628; S. C., 5 Bing. 525; *Edie v. East India Co.*, 2 Burr. 1227; *Ancher v. Bank of England*, Doug. 637; *Cunliffe v. Whitehead*, 3 Bing. N. C. 828. An indorsement in the following forms: "Pay the contents to A B only," or "pay A B for my use," or "pay A B for my account," prevents the bill from being further transferred; and the indorsement plainly shows that the indorser does not intend to part with the absolute property in the bill, and that the indorsement is a mere authority to receive the money upon the bill. *Ib.* Such an indorsement is a full and direct notice that the indorsee has no title to the bill, and that he has no right to dispose of it. *Ib.*

The owner or holder of a bill or note may transfer it absolutely

or conditionally, and when it is transferred upon a condition, such condition must be complied with before the title passes. *Robertson v. Kensington*, 4 Taunt. 30; *Sanders v. Bacon*, 8 Johns. 485; *Tappan v. Ely*, 15 Wend. 362. But a bill or note cannot be divided so as to authorize a transfer of a part of it, and if only a portion of it is assigned, no action will lie by the indorsee to recover such portion. *Douglass v. Wilkeson*, 6 id. 637; S. C., 22 id. 559; *Hawkins v. Cardy*, 1 Ld. Raym. 360; S. C., 1 Salk. 65; *Miller v. Bledsoe*, 1 Scam. 530. If a part of the bill or note has been paid, the balance of it may be assigned. *Ib.* When the payee or indorsee of a bill or note intends simply to sell or transfer the instrument without rendering himself liable thereon as indorser, he ought to state that fact in the indorsement, which may be done by adding under his name, "without recourse to me," or by employing any other words which show that he does not intend to incur any responsibility. *Guopy v. Harden*, 1 Holt's N. P. 342; S. C., 7 Taunt. 160; 2 Marsh. 454; *Richardson v. Lincoln*, 5 Metc. 201; *Fitchburg Bank v. Greenwood*, 2 Allen, 434; *Cady v. Shepard*, 12 Wis. 639; *Craft v. Fleming*, 46 Penn. St. 140; see *ante*.

Any form of words is sufficient to prevent a liability on the part of such indorser, if the language clearly shows that the intention is to avoid responsibility. The addition of the word "agent," or "treasurer," or "cashier," and the like, will relieve such indorser from liability, if he is known to be acting as a mere agent, or in an official station, for the advantage or on the behalf of the real party in interest. *Babcock v. Beman*, 11 N. Y. (1 Kern.) 200; S. C., 1 E. D. Smith, 593; *Mott v. Hicks*, 1 Cow. 513; *Brockway v. Allen*, 17 Wend. 40; *Hicks v. Hinde*, 9 Barb. 528; *Bruce v. Lord*, 1 Hilt. 247; *Horton v. Garrison*, 23 Barb. 176. An actual delivery ought to accompany the indorsement or transfer of a bill or note, because there is an important legal presumption in favor of the holder or possessor of negotiable paper, one of which is, that he is a *bona fide* purchaser, for value, before the bill or note became due. *James v. Chalmers*, 5 Sandf. 52; S. C., 6 N. Y. (2 Seld.) 209; *Seeley v. Engell*, 17 Barb. 530; S. C., 13 N. Y. (3 Kern.) 542; reversed, but upon another point. When the payee or indorsee of a bill or note transfers it by a mere delivery, he ceases to be a party to the instrument. But when he transfers it by an indorsement in blank, or in full, his liability is equivalent to making a new note, or to drawing a new bill. And when the payee or indorsee of a bill of exchange

transfers it by an indorsement in blank, or in full, his indorsement is a contract in the nature of a new drawer, and he is liable to every succeeding holder in default of acceptance or payment by the drawee. The drawee and acceptor is primarily liable upon the bill, and the drawer and each indorser are each liable collaterally to the holder, provided those steps are taken which the law merchant requires. When the payee or the indorsee of a negotiable note transfers it by an indorsement in full or in blank, he is liable to pay the amount to every subsequent holder or indorsee, provided the maker does not pay it, and a proper demand is made, and due notice of non-payment given to such indorsee. But the indorser of a promissory note does not stand in the situation of a maker relatively to his indorsee. *Gwinnett v. Herbert*, 5 Ad. & Ellis, 436; *Dean v. Hall*, 17 Wend. 214. Where a party transfers a note which is not negotiable, by indorsement, in payment of his own debt, it is not necessary to give him notice of non-payment by the maker. *Plimly v. Westley*, 2 Bing. N. C. 249; *Hill v. Lewis*, 1 Salk. 102; *Warring v. Richards*, 4 Abb. Ct. App. 47; 1 Keyes, 576; *Cromwell v. Hewitt*, 40 N. Y. (1 Hand) 491; *Houghton v. Erly*, 26 Wis. 181; 7 Am. Rep. 52. It is said that the indorser of a note not negotiable may, in such a case, be treated as a maker of a note. *Ib.* However that may be, he is certainly liable on his original indebtedness in case the note is not paid. *Johnson v. Gilbert*, 4 Hill, 178; *Tyler v. Stevens*, 11 Barb. 485; *Torry v. Hadley*, 27 id. 192; *Cardell v. McNeil*, 7 E. P. Smith, 336. An indorsement does not become a binding agreement until the delivery of it with the instrument upon which it is made. And at any time before delivery the indorser may erase his signature, which will entirely destroy its effect as an indorsement. When a note is payable to the order of a person, and he transfers it before maturity, but does not indorse it until after maturity, the indorsement does not relate back to the time of the transfer, and the transferee takes the note subject to all the equities between the original parties. *Lancaster National Bank v. Taylor*, 100 Mass. 18; 1 Am. Rep. 71; *Clarke v. Whitaker*, 50 N. H. 474; 9 Am. Rep. 286.

An indorser is estopped from denying that all indorsements prior to his were made by persons having competent authority. *Magregor v. Rhodes*, 6 Ell. & Bla. 266.

And, in such a case, the indorsement is always an admission that the prior indorsements are valid. *Ib.* and cases cited. An indorser impliedly warrants that the instrument is not forged,

and he is liable on this warranty in case the instrument proves to be a forgery. *Herrick v. Whitney*, 15 Johns. 240; *Shaver v. Ehle*, 16 Johns. 201; *Morrison v. Currie*, 4 Duer, 79.

The indorsement of a promissory note imports a guaranty by the indorser, that the makers are competent to contract in the character in which, by the terms of the paper, they purport to contract; and, therefore, where a note was void because it was made by married women, the indorser of the note was held liable. *Erwin v. Downs*, 15 N. Y. (1 Smith) 575. Knowledge by the plaintiff, at the time he received the note, that the makers were married women does not affect his right to recover. *Ib.* See *Remsen v. Graves*, 41 N. Y. (2 Hand) 471; *Putnam v. Schuyler*, 4 Hun, 166; 6 S. C. (T. & C.) 485; *Dalrymple v. Hillenbrand*, 2 Hun, 488; 5 S. C. (T. & C.) 57; 62 N. Y. (17 Sick.) 5; *McLaughlin v. McGovern*, 34 Barb. 208. Where the payee of a usurious note indorsed it to a third person, for a valuable consideration, who took it without notice of the usury, and afterward he brought an action against the payee seeking to charge him as indorser; it was held that the indorsement amounted to a new and independent contract between the parties, that the usury constituted no defense, and that the plaintiff was entitled to recover. *McKnight v. Wheeler*, 6 Hill, 492.

So, in an action against the drawer of a bill given for a gaming debt, it is no defense that the bill was given for such a debt, if the bill was indorsed over by the drawer for a valuable consideration, to a third person, by whom the action is brought. *Edwards v. Dick*, 4 Barn. & Ald. 212.

The decisions proceed upon the principle that an indorser warrants the genuineness and the title of the paper which he transfers; and that, when prosecuted upon his contract of indorsement, he is estopped from denying the existence, the legality, or the validity of the contract which he has assigned, whenever he seeks to escape from liability on account of the invalidity of the paper transferred. *McKnight v. Wheeler*, 6 Hill, 492; *Edwards v. Dick*, 4 Barn. & Ald. 212.

The acceptor of a bill of exchange is presumed to know the signature of the drawer, and if a bill is accepted, the acceptor is liable to a *bona fide* indorsee or holder for value, although the bill proves to be a forgery. *National Park Bank v. Ninth National Bank*, 46 N. Y. (1 Sick.) 77; 7 Am. Rep. 310; *Bank of Commerce v. Union Bank*, 3 N. Y. (3 Comst.) 230; *Price v. Neal*, 3 Burr, 1354; *Smith v. Mercer*, 6 Taunt. 76; S. C., 1 Marsh. 453;

Wilkinson v. Lutwidge, 1 Strange, 648; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Coggill v. American Exchange Bank*, 1 Comst. 113. And if the bill is paid, the acceptor cannot recover from the holder or indorsee of the bill the amount so paid him, although the acceptor paid it on the supposition that the signature was valid; even though he learned subsequently to the payment that it was a forgery. *Ib.*

The indorser's contract to pay is conditional, and if the maker of the note pays it, or he is in any way legally discharged from its payment, the indorser is discharged from liability. What acts will discharge an indorser or surety will be discussed hereafter. Where there are several indorsers of a bill or note, and the note or bill is dishonored, and due notice given, any one of the indorsers may take up such bill or note, and he can then maintain an action against any or all of the prior indorsers to recover the amount so paid; because, as between the indorsers themselves, the liability is determined by the priority of indorsement. *Barker v. Cassidy*, 16 Barb. 177; *Leonard v. Barker*, 5 Denio, 220, 223; *Bradford v. Corey*, 5 Barb. 461; *Corey v. White*, 3 *id.* 12; *Hays v. Phelps*, 1 Sandf. 64. A second indorser of a note, who, by mistake or inadvertence, writes his name above the first indorser, and is called upon to pay a portion of the note, may recover the amount so paid, from the first indorser. *Slack v. Kirk*, 67 Penn. St. 380; 5 Am. Rep. 438.

The general rule is, that a payee cannot recover against a subsequent indorser. But where a second indorser of a note puts his name upon it in blank, with the knowledge that it is to give the maker credit with the payee, he is liable in an action by the payee. *Moore v. Cross*, 17 How. 385; S. C., 19 N. Y. (5 Smith) 227; *Waterbury v. Sinclair*, 26 Barb. 455; S. C., 16 How. 329; *Coulter v. Richmond*, 59 N. Y. (14 Sick.) 478. And parol evidence is admissible in this case to show the original consideration and agreement of the parties, and that the agreement is contrary to the legal inference which arises upon the face of the note. *Ib.* In such a case the payee has a right to indorse the note without recourse, and the court will treat the note as having been thus indorsed, whether it is actually done or not. *Ib.* A prior indorser cannot recover against a subsequent one, in the absence of an agreement between them; but if it is agreed between a prior and a subsequent indorser that the latter is to be liable to the former, the agreement is valid and will be enforced. *Hubbard v. Matthews*, 54 N. Y. (9 Sick.) 43; 13 Am. Rep. 562; see *Chad-*

dock v. Vanness, 35 N. J. 517; 10 Am. Rep. 256. If one who stands in the character of second indorser upon a note is not made liable at the maturity and non-payment of the note, no act or indorsement of the payee, subsequent to the maturity of the note, can render the second indorser liable. *Bacon v. Burnham*, 37 N. Y. (10 Tiff.) 614; 5 Trans. App. 210.

Where one indorses a promissory note payable to another or order, prior to its delivery to the payee, in the absence of proof that he indorsed with intent to become surety for the maker to the payee, the legal presumption is that he stands in the position of subsequent indorser; and the payee can neither maintain an action upon the indorsement, nor can he transfer a right of action thereon to a purchaser with notice, except upon assuming the responsibility of first indorser. *Phelps v. Vischer*, 50 N. Y. (5 Sick.) 69; 10 Am. Rep. 493.

Where the maker of a note gives full security to any indorser, and he releases that security, he will forfeit any right to recover against any prior indorser. *Per Lee v. Onderdonk*, 19 Barb. 562. So, where a creditor receives from his principal debtor collateral security sufficient to pay the debt, the surety is discharged if the security is surrendered without his consent. *Pitts v. Congdon*, 2 Comst. 352. But where the holder of a promissory note indorses and transfers it for value, in the usual course of business, he is not a surety within the meaning of this rule, and therefore he will not be discharged, although the indorsee takes security from the maker, and afterward surrenders it without his consent. *Ib.*

ARTICLE VIII.

LOST BILLS AND NOTES.

Section 1. In general. At common law, if the owner of a negotiable bill or note lost it, so that it could not be produced at the trial, he could not maintain an action upon it. *Rowley v. Ball*, 3 Cow. 303; *Kirby v. Sisson*, 2 Wend. 550; *Moses v. Trice*, 21 Gratt. 556; 8 Am. Rep. 609. And this was the rule, even though the note was lost after it became due. *Ib.* But if the bill or note was not negotiable, or if the evidence did not show affirmatively that it was negotiable, the plaintiff could recover upon it notwithstanding its loss. *Pintard v. Tackington*, 10 Johns. 104; *McNair v. Gilbert*, 3 Wend. 344; *Wright v. Wright*, 54 N. Y. (9 Sick.) 437. The wrongful detention of negotiable paper, in a

sister State, by a person who claims under a forged indorsement, does not, either in equity, or under the statute as to lost paper, entitle the true owner to recover against the drawer, without producing the paper. *Van Alstyne v. National Commercial Bank*, 4 Abb. Ct. App. 449 ; 7 Trans. App. 241.

In an action upon a promissory note, made by the defendant, and payable to the plaintiff, or bearer, where the note is produced at the trial by a witness who claims to own it as administrator of an estate, the plaintiff cannot recover although he testifies that he then owns the note, because he has not possession of the note, and it is not lost. *Crandall v. Schroepfel*, 1 Hun, 557 ; 4 S. C. (T. & C.) 78. A party paying a promissory note is entitled to the delivery of it on payment, or to have it produced, that it may be discharged, or destroyed in his presence. *Ib.*

Where the inability to produce the note, bill, or check, is caused by the wrongful act of the defendant, the plaintiff may recover without producing it. *Johnson v. First National Bank*, 6 Hun, 124.

In an action upon a lost note, if there is some evidence that the plaintiff was the owner at the time it was lost, the question of ownership is for the jury. *Smith v. Young*, 2 Barb. 545. To entitle one to recover upon a negotiable note, which has been lost, after being negotiated, the party must comply with the provisions of the statute, under which alone he can maintain an action at law. *Ib.*

To entitle a party to recover on a lost instrument, the proof of the genuineness of the original must be clear and satisfactory. *Slone v. Thomas*, 12 Penn. St. 209.

The statute now makes provision for a recovery upon negotiable instruments which are lost.

"In any suit founded upon any negotiable promissory note or bill of exchange, or in which such note, if produced, might be allowed as a set-off in the defense of any such suit, if it appear on the trial that such note or bill was lost while it belonged to the party claiming the amount due thereon, parol or other evidence of the contents thereof may be given on such trial, and notwithstanding such note or bill was negotiable, such party shall be entitled to recover the amount due thereon, as if such note or bill had been produced." 2 R. S. 423, § 75, Edm. ed.

"But to entitle a party to such recovery, he shall execute a bond to the adverse party, in a penalty at least double the amount of such note or bill, with two sureties, to be approved

by the court in which the trial shall be had, conditioned to indemnify the adverse party, his heirs and personal representatives, against all claims by any other person on account of such note or bill, and against all costs and expenses by reason of such claim." 2 R. S. 423, § 76, Edm. ed.

It has been already seen that a recovery might be had on a lost note which was not negotiable, even before the enactment of this statute. The statute applies, in terms, to negotiable instruments, and to no others. And it provides for such instruments in the event of their loss, but not in any other case. It must be made to appear on the trial that the bill or note was lost while it belonged to the party who claims the amount due thereon. Statute, § 75, above cited.

So, too, it must appear affirmatively at the trial, that the lost instrument was negotiable, or the plaintiff may recover without giving any bond of indemnity. *McNair v. Gilbert*, 3 Wend. 344; *Pintard v. Tackington*, 10 Johns. 104; *Wright v. Wright*, 54 N. Y. (9 Sick.) 437. In the absence of evidence upon the subject, there is no presumption that the note was negotiable, and that fact must be proved. *Ib.*; *Blade v. Noland*, 12 Wend. 173. Where the instrument has been deliberately destroyed by the owner, he cannot recover upon it as a lost bill or note. *Ib.* In an action upon negotiable paper which has been lost, the giving of the bond required by the statute, with sufficient sureties, and conditioned as the statute requires, is an indispensable prerequisite to any recovery thereon. *Desmond v. Rice*, 1 Hilt. 530. A check is a bill of exchange within this statute. *Jacks v. Darin*, 1 Abb. 148; S. C., 3 E. D. Smith, 548, 557.

The plaintiff is entitled to recover although the bill or note is lost after the action is commenced. *Ib.* An action may be maintained by the plaintiff upon a promissory note which has been accidentally destroyed without giving an indemnity bond. *Des Arts v. Leggett*, 16 N. Y. (2 Smith) 582; S. C., 5 Duer, 156.

But where it is proved that the plaintiff has deliberately and voluntarily burnt the note, he will not be permitted to introduce secondary or inferior evidence of its contents. *Blade v. Noland*, 12 Wend. 173. See the general subject discussed, *ante*, 165, 166, 167.

The statute was intended to be an advantage to both the maker and the holder or owner of a lost negotiable bill or note. Without the aid of the statute no action could be maintained in a court of law, if the instrument was payable to bearer, or if payable to

order and indorsed in blank, or if it was negotiable by mere delivery. The reason why the plaintiff was required to produce the note at the trial was, that if a recovery were permitted on it without its production, the maker might subsequently be required to pay the same note to some other person who was the true owner and possessor, for value, and in good faith, at the time of the first recovery.

To prevent this result, the statute requires the plaintiff to give a bond which will indemnify the maker against the claims of such *bona fide* holder, or of any other person. And the indemnity extends to costs and expenses as well as to the debt itself.

The statute makes no distinction between a bill or note which is lost before it is due, and one lost after it is due. In either case, there must be a bond given for a full indemnity against the demand, and for all costs and expenses incurred by reason of any claim made by a third person. When the plaintiff can show that the maker cannot be put to any loss on account of the bill or note, as where it is clearly proved that the instrument was accidentally destroyed by a fire, no bond of indemnity is required. *Des Arts v. Leggett*, 16 N. Y. (2 Smith) 582; S. C., 5 Duer, 156. Where a paid note is of value to the party paying it, as a voucher, he is entitled to have the note delivered to him when it is paid. *Cahoon v. Bank of Utica*, 7 N. Y. (3 Seld.) 486; *Hansard v. Robinson*, 7 Barn. & Cress. 90. Where the plaintiff loses a bill or note which requires his indorsement to render it negotiable, he may recover on it, or for the original consideration, without an indemnity bond, if he proves that the instrument had not been indorsed by him at the time of its loss. *Rolt v. Watson*, 4 Bing. 273; *Long v. Bailie*, 2 Camp. 214, in note; *Pintard v. Tackington*, 10 Johns. 104. But if it appears in evidence that it had been indorsed before its loss, an indemnity would be required. *Champion v. Terry*, 3 Brod. & Bing. 295.

Actual possession of the note by the plaintiff is not important, provided he is entitled to the money due upon it. *Selden v. Pringle*, 17 Barb. 458.

In order to charge the indorser of a lost negotiable promissory note, the holder must tender an indemnity to both indorser and maker at the time of demand and notice, and should the indorser sustain any injury by reason of the holder's neglect in this particular, it will be a good defense at the trial. *Smith v. Rockwell*, 2 Hill. 482. A demand of payment of a lost note will be sufficient without an offer of a bond of indemnity, where it appears

either that the note was not negotiable, or if negotiable, that it had not been indorsed. *Bishop v. Sniffen*, 1 Daly, 155 ; see *Miller v. Woods*, 21 Ohio St. 485 ; 8 Am. Rep. 71.

This statute relates merely to the remedy on lost negotiable bills and notes, and it does not affect any rights or liabilities of the parties arising out of the proceedings to charge the drawers or indorsers. *Ib.* If the note or bill is temporarily lost, but it is produced at the trial, the plaintiff may recover without giving a bond of indemnity. *Ib.* The loss of a bill or of a negotiable note does not change the contract entered into by the parties to the instrument, in any material particular; its only effect is to give the parties called upon to pay, a right to demand security against any further or different liability than that which they have assumed. The mode of demanding payment is necessarily changed, but the act is not dispensed with. The owner cannot present the bill or note for payment as the holder is ordinarily required to do, but he can make a valid demand of payment by tendering to the maker or acceptor a proper indemnity, even where he refuses to pay on the ground that the note is not presented in consequence of its loss. And the indorser cannot complain that a demand of payment is defective, when the law declares that it is legal and valid ; but to charge him as an indorser, it is in all cases incumbent on the holder to give him notice of its dishonor. In an action on a negotiable promissory note, against the makers and indorsers, the demand was made, and notice of non-payment given, without any objection being interposed by any of the parties, on account of the absence of the note ; no bond of indemnity was offered to the makers or the indorsers, nor was any requested by either of them ; and it did not appear that either of them knew of the loss until the suit was commenced, and the note being found before the trial, the proceedings were held sufficient to charge the indorser, and judgment was rendered for the plaintiff. *Smith v. Rockwell*, 2 Hill, 482.

It makes no difference whether a bill or note has been accidentally destroyed or lost by the owner ; it is necessary in either case to make a regular demand of payment at the time it becomes due, and to give due notice of the non-payment to the drawers and indorsers, in the same manner as though it had not been lost or destroyed. *Thackray v. Blackett*, 3 Camp. 163. Where the holder of bank bills cuts them into two parts for the purpose of safe transmission by mail, he is entitled to recover the amount

of the bills of the bank, when it appears that the bills were actually mailed, and that only one set of the halves came safely to hand. *Hinsdale v. Bank of Orange*, 6 Wend. 378. Severing the bills does not destroy their negotiability, so as to prevent a restoration by putting the parts together again; but, in their severed condition, neither part is negotiable so as to entitle any person to become a *bona fide* holder of a separate half. And, therefore, the owner of them is entitled to demand the amount due on the face of the bills, in the same manner as though they had been actually destroyed, or as though they had not been negotiable. *Ib.* If the overseer of a bank bill accidentally tears it into two nearly equal parts, and loses one of them, upon which there are no words giving it a negotiable character, the bank will be liable upon the bill. *Martin v. Blydenburgh*, 1 Daly, 314.

Where a bill of exchange, a note or a check, drawn payable to bearer or to order, and indorsed in blank, is lost or stolen, the owner should, for his own protection, immediately give notice to all the parties not to pay the money thereon to any person but himself; and he should publish a notice as extensively as possible in the newspapers, when that is the most ready and efficient mode of publication, cautioning all persons against taking or buying the lost or stolen paper. The notice ought to be explicit and definite in its description of the lost instrument, as to date, amount, parties, and time when payable.

In the case of an accepted bill, the acceptor ought to be forthwith notified not to pay the bill to any person but the owner; and in the case of a note, the same notice should be promptly given to the maker. So, in the case of a check, or of an unaccepted draft, the drawee or the bank ought to be directed not to pay the check in the one case, nor to accept the draft in the other.

The title which a *bona fide* purchaser will obtain on the purchase of a stolen bank bill, check, bill of exchange or negotiable promissory note, will be fully discussed in another place.

ARTICLE IX.

CONSIDERATION OF BILLS AND NOTES.

Section 1. In general. This subject has already been discussed, *ante*, in relation to the necessity of a consideration, its sufficiency, its validity, and its legality. There are some cases which may be conveniently and properly noticed in this place.

As between the original parties to a bill or note, there is the same necessity for a consideration that there is in the case of any other contract which they may make. And between these parties the question of consideration, either as to its sufficiency, validity or legality, is always open as a defense to such bill or note. If the instrument is a negotiable bill or note, there is then a legal presumption that the consideration was sufficient, and that it was valid and legal. This presumption, however, may be rebutted. But the burden of proof is on the defendant, to show the want of consideration or its illegality. *Clark v. Sisson*, 22 N. Y. (8 Smith) 312; S. C., 5 Duer, 468; *Holliday v. Atkinson*, 5 Barn. & Cress. 501; *Safford v. Wyckoff*, 4 Hill, 442. Where the instrument is not a negotiable one, and it does not recite a consideration upon its face, as, "for value received," or the like, there is no presumption of consideration, and one must be proved on the trial, as in the case of other contracts. *Ante*, 90. But there are instances in which even negotiable paper is subject to examination as to its consideration, even as to subsequent indorsees or holders. Whenever a bill or note is taken after it has been dishonored, it is then taken by the purchaser subject to every defense which would have been available between the original parties to it. But, even in this case, there is a presumption in favor of the holder, which is, that he took the instrument before it was due, and for value. *Ante*, 567. And this presumption must be rebutted before the defendant will be permitted to prove such a defense as would be available between the original parties. *Pinkerton v. Bailey*, 8 Wend. 600. There are several cases in which the consideration may be inquired into, although the bill or note was transferred before it was due. And where the purchaser has notice or knowledge of the equities between the original or prior parties, or of the insufficiency or illegality of the consideration, he takes it subject to all such equities, and open to all such defenses. *Rumsey v. Leek*, 5 Wend. 20; *Skilding v. Warren*, 15 Johns. 270; *Small v. Smith*, 1 Denio, 583; *Sawyer v. Chambers*, 44 Barb. 42; 43 id. 622; *Van Valkenburgh v. Stuppelbeen*, 49 id. 99. But if a purchaser, with notice, transfers a bill or note before it is due, to a *bona fide* holder, for value, the latter may recover. *Robinson v. Reynolds*, 2 Ad. & Ell. (N. S.) 196. If the first indorsee of a promissory note acquires a right of action as against the maker, by being a *bona fide* purchaser without notice and before maturity, he can transfer a good title as well after as before the note became due. *Woodman v. Churchill*, 52 Me. 58;

Bassett v. Avery, 15 Ohio St. 299 ; *Peabody v. Rees*, 18 Iowa, 571. Where the holder of a promissory note which is invalid in his hands, by reason of its having been already paid, wrongfully transfers it, before maturity, to a *bona fide* holder, who enforces payment thereof, an action will lie against such original holder, by the maker, to recover back the amount. *Newell v. Gregg*, 51 Barb. 263 ; see *Coleman v. Lansing*, 4 Lans. 70.

There are several legal presumptions in favor of negotiable paper, which are designed to facilitate the use and negotiation of commercial paper. It is presumed, until the contrary appears, that every negotiable bill or note is founded upon a sufficient legal consideration ; that the holder and possessor of a bill or note is the true owner ; that indorsed paper was indorsed before it became due ; that the holder of a bill or note took it in the usual course of business for value ; that the maker of a note is the primary debtor, and that the acceptor of a bill of exchange is primarily liable thereon. These presumptions, which are indulged for the advantage of commercial interests and intercourse, are not conclusive, but are liable to be rebutted by proof that the facts are different from the legal presumption. But the burden of proof lies upon the party who wishes to rebut the presumption ; and in the absence of proof sufficient to overcome these presumptions, they will stand as facts established. It is a general rule that parol evidence is not admissible to control or to contradict a written instrument. See title Evidence. This rule is equally applicable to bills and notes. And, for that reason, parol evidence is not admissible to show that a chattel note, which was payable absolutely, was given upon an oral agreement that the note was to be void upon the happening of a specified event. *Erwin v. Sanders*, 1 Cow. 249 ; *Ely v. Kilborn*, 5 Denio, 514 ; or that it was to have no validity except upon the happening of a certain event. *Payne v. Ladue*, 1 Hill, 116 ; *Brown v. Hull*, 1 Denio, 400 ; or that there is a mistake as to the time of payment mentioned. *Fitzhugh v. Runyon*, 8 Johns. 375 ; *Thompson v. Ketcham*, id. 190 ; or that a note was to be renewed and not demanded when due. *Hoare v. Graham*, 3 Camp. 57. But where a note was given for \$1,033.88, on the purchase of a quantity of growing grain, estimated to be one hundred and five acres, at \$9.75 an acre, and there was an oral agreement at the time of giving the note, that the land should be measured, and if the quantity of land was less than that assumed, then there was to be a reduction of the amount to correspond with the sum which

would be due on such measurement, it was held that the oral agreement was valid, and that there could be no recovery for any amount beyond that which would be due upon such measurement. *Carter v. Hamilton*, 3 Clint. Dig. 2754, No. 87, reversing same case in 11 Barb. 147.

It has been held, however, that where a promissory note is given for a definite sum, no oral evidence is admissible to show that at the time of giving the note, it was agreed between the parties that an account which the maker held against the payee should be deducted. *Evans v. Henderson*, 17 Wend. 190.

But although parol evidence is not admissible as a general rule, for the purpose of establishing that there was an oral agreement which contradicts the written instrument; yet it is competent to show, by parol evidence, that the note was obtained by fraud; or that there was a mistake made in it as to the amount due, if such defense is offered in an action between the original parties to the note; or in an action by those who have taken it before due with notice; or as against a holder who has taken it after it was dishonored. *Ante*, 437. There may be oral agreements in relation to the execution and delivery of bills and notes which will defeat a recovery upon them. Where a party signs a promissory note on condition that another person shall also sign it, above his signature, he is not liable upon the note unless the condition is complied with. And a party suing upon such note is bound to show how it came into his hands without a compliance with the condition. *Miller v. Gamble*, 4 Barb. 146; *Ely v. Kilborn*, 5 Denio, 514; *Awde v. Dixon*, 6 Exch. 869.

So the drawer of a bill cannot maintain an action upon it against the drawee, who has accepted it for his accommodation. *Reynolds v. Doyle*, 1 Man. & Grang. 753; *Sparrow v. Chisman*, 9 Barn. & Cress. 241; *Thompson v. Clubley*, 1 Mees. & Wels. 212. Where a note is indorsed for the accommodation of the maker, or a bill is accepted for the accommodation of the drawer, without any restriction, and it is negotiated to a third person, who pays value for it, the party receiving it is entitled to recover upon it, against such indorser or acceptor, notwithstanding the purchaser took it with full knowledge that it was accommodation paper. *Ross v. Bedell*, 5 Duer, 462, 467; *Grant v. Ellicott*, 7 Wend. 227; *Smith v. Knox*, 3 Esp. 46; *Commercial Bank v. Norton*, 1 Hill, 501.

But where it is shown that the bill or note, in respect to the defendant in the action, was fraudulently put into circulation or

negotiated, or that it was lost or stolen, the plaintiff is not entitled to recover without proof that he parted with value for it when it came into his hands. *Ross v. Bedell*, 5 Duer, 462, 467; *Berry v. Alderman*, 5 J. Scott (14 C. B.), 95; *Smith v. Braine*, 16 Ad. & E. (N. S.) 244; *Bailey v. Bidwell*, 13 Mees. & Wels. 76; *Harvey v. Towers*, 6 Exch. 656; *May v. Seyler*, 2 id. 563, 566; *Edmunds v. Groves*, 2 Mees. & Wels. 642.

So, where an accommodation bill or note is made for a special purpose — such, for instance, as to enable the maker to obtain a discount at a particular bank, or to raise money in a given way to pay a certain draft, the maker has no right to use the note in any other way; and if he does so, it is a fraudulent diversion of the note from its original object and design; and if the person who received it from the maker knew the circumstances and the terms upon which such indorsement was made, or if he is chargeable with notice thereof, he cannot recover on it against the indorser. *Kasson v. Smith*, 8 Wend. 437; *Brown v. Taber*, 5 id. 566; *Denniston v. Bacon*, 10 Johns. 198; *Skilding v. Warren*, 15 id. 270; *Rochester v. Taylor*, 23 Barb. 18; *Prall v. Hinchman*, 6 Duer, 351; *Farrington v. Frankfort Bank*, 31 Barb. 183; 24 id. 554.

But, although negotiable paper is diverted from the purpose for which it was made, a *bona fide* holder, for value, may recover upon it. *Ayrault v. McQueen*, 32 Barb. 305; *Small v. Smith*, 1 Denio, 583; *Boyd v. Cummings*, 17 N. Y. (3 Smith) 101; *Park Bank v. Watson*, 42 N. Y. (3 Hand) 490; 1 Am. Rep. 573. A surrender by a creditor to his debtor of a security sufficient to have paid the debt due to the former, is a sufficient payment of value to constitute a valid purchase. *Ayrault v. McQueen*, 32 Barb. 305. One who takes a note before its maturity in payment of a note already due, is a holder for value. *Brown v. Leavitt*, 31 N. Y. (4 Tiff.) 113; *Mechanics and Traders' National Bank v. Crow*, 60 N. Y. (15 Sick.) 85. So, whenever a creditor surrenders up an existing note, and receives in exchange such accommodation note, in good faith, this is paying value for it, so as to render the accommodation indorser liable to pay the note. *Youngs v. Lee*, 12 N. Y. (2 Kern.) 551; *Seneca County Bank v. Neass*, 3 Comst. 443; *Stettheimer v. Meyer*, 33 Barb. 215; *Lathrop v. Morris*, 5 Sandf. 7; *White v. Springfield Bank*, 3 id. 222. And it makes no difference whether the note surrendered was due, or not due, at the time of giving it up in exchange for the substituted note. *Stettheimer v. Meyer*, 33 Barb. 215; *Youngs*

v. *Lee*, 12 N. Y. (2 Kern.) 551; S. C., 18 Barb. 187; *Curra v. Misa*, L. R., 10 Exch. 153; 12 Eng. Rep. 592, 608-616, *note*.

So, where an accommodation note is received by a creditor as payment of a debt or an account against his debtor, and the amount is credited to him, or a receipt is given for the amount, this is paying value so as to enable the creditor to recover on the note against the accommodation maker or indorser. *Purchase v. Mattison*, 3 Bosw. 310; S. C., 6 Duer, 588; *De Zeng v. Fyfe*, 1 Bosw. 335; see, however, *Spear v. Myers*, 6 Barb. 445. But when a creditor receives such accommodation note as a collateral security, and not as a payment of the debt due to him, he is not a holder for value, and he cannot recover against such accommodation maker or indorser. *White v. Springfield Bank*, 3 Sandf. 222; S. C., 1 Barb. 225; *Goldsmid v. Lewis County Bank*, 12 Barb. 407; *Clarke National Bank v. Bank of Albion*, 52 id. 592. But, in Maryland it is held that one who receives an accommodation note as collateral security for an antecedent debt, without other consideration, is a holder for value within the rule of protection against antecedent equities. *Maitland v. Citizens' National Bank of Baltimore*, 40 Md. 540; 17 Am. Rep. 620, 628 and cases cited.

A promissory note was indorsed for the accommodation of the maker, and was transferred by him before maturity to a judgment creditor as security for the payment of his judgment, and in consideration of the discontinuance of proceedings supplementary to the execution then pending against the maker; such discontinuance was held to make the creditor a holder for a valuable consideration, and that, not having any notice of any restriction imposed upon the maker as to the use to be made of the note, he could recover against the indorser. *Boyd v. Cummings*, 17 N. Y. (3 Smith) 101.

The drawer of an accommodation check cannot set up any other defense against a *bona fide* holder than would be competent to him had he delivered the check for value. *Harbeck v. Craft*, 4 Duer, 122. So, the maker of a promissory note for the accommodation of the payee cannot set up as a defense, in cases exempt from fraud, that the note was transferred to the plaintiff, in satisfaction of a pre-existing debt, or that it was taken as a collateral security therefor. *De Zeng v. Fyfe*, 1 Bosw. 335; *Lathrop v. Morris*, 5 Sandf. 7; *Bank of Rutland v. Buck*, 5 Wend. 66; *Grandin v. Le Roy*, 2 Paige, 509. There is a distinction which ought to be observed in relation to these notes. Where a note or

bill is made for the accommodation of an individual, and there is no restriction as to the use which he is to make of it, such individual may get it discounted for cash, or he may pay an old debt with it, or he may turn it out as security for the payment of an old debt, and the creditor may recover upon it as against such maker or indorser.

But where the note is made for a special purpose, and it is diverted from that purpose, and the creditor receives it with notice of that fact, or he receives it as a mere collateral security of a debt due to him, he cannot recover against such accommodation maker or indorser; though, as we have seen above, the creditor may recover upon the note, if he has received it absolutely in payment.

Upon grounds of public policy growing out of commercial convenience or necessities, a holder of negotiable paper may, under certain circumstances, recover upon it, notwithstanding any defect in the title of the person from whom he derived it; even though such person may have obtained or acquired it by fraud, theft, or robbery. *Hall v. Wilson*, 16 Barb. 548; *Stalker v. McDonald*, 6 Hill, 93; *Miller v. Race*, 1 Burr. 452, and 1 Smith's Lead. Cas. 808-826, 7th Am. ed., where numerous cases are collected. But this rule does not apply, where negotiable securities have been obtained and put into circulation fraudulently, feloniously, or without consideration, unless the person who has them became a holder thereof in good faith, for a full and fair consideration, in the usual course of business, and without notice of the invalidity of the title. *Ib.* W. made a promissory note for \$120, payable to U., or bearer. The note was never delivered, but was placed by the maker in his desk as a place of deposit, from whence it was stolen by B., a laborer in his employ, and was by him transferred to one Bigelow for \$115. Before the note became due, Bigelow transferred it to the plaintiff; and it was held that he could not recover upon it, because the note never had a legal inception, for want of a delivery; that the transfer to Bigelow was void for usury; and also because the note was not taken by him *bona fide*, for a full and fair consideration, in the usual course of business. *Hall v. Wilson*, 16 Barb. 548. A note to be the subject of sale must be a valid note in the hands of the payee, and be given for some actual consideration, so that it can be enforced between the original parties, and if not valid in the hands of the payee, it cannot be rendered valid by a sale to a *bona fide* purchaser at a rate of

interest exceeding seven per cent. *Sweet v. Chapman*, 7 Hun, 576. But where negotiable paper has been once properly delivered, the maker or acceptor may, in some cases, be held liable, although such instrument is subsequently put into circulation fraudulently or feloniously. A. accepted a bill of exchange and gave it to B., who put his name thereto as drawer, for the purpose of having it discounted and the proceeds paid over to A. B. attempted, but unsuccessfully, to get the bill discounted, and he then returned it to A., who tore the bill into two pieces, and threw them away into the street, intending to cancel it, as the jury found upon proper evidence. B. picked them up in A.'s presence, and afterward pasted the two pieces together, and put the bill in circulation. The tearing of the bill was done in such a way that the appearance of the bill was as consistent with its having been divided for safe transmission by mail, as with its having been torn for the purpose of destroying it, and it was held that A. was liable upon it at the suit of a *bona fide* holder without notice. *Ingham v. Primrose*, 7 C. B. (N. S.) 82. So, where a money changer at Paris, twelve months after he had received notice of a robbery of bank notes at Liverpool, took one of the stolen notes, for five hundred pounds, at Paris, giving cash for it, less the current rate of exchange, from a stranger, whom he merely required to produce his passport and write his name on the back of the note, it was held that the circumstance of his forgetting or omitting to look for the notice was no evidence of bad faith, and that the bank was liable to the plaintiff for the amount of the bill. *Raphael v. Bank of England*, 8 J. Scott (17 C. B.), 160, where the English cases are fully reviewed. One who takes a bank note, or other negotiable security, *bona fide*, that is, giving value for it, and having no notice at the time that the party from whom he takes it has no title, is entitled to recover upon it, even although he may at the time have had the means of knowledge of the fact, of which means he neglected to avail himself. *Ib.* The old established rule of law that the holder of bills, bank notes, etc., can give a title which he does not possess, to a person taking them *bona fide* for value, is not to be qualified by treating it as essential that the person should take them with due care and caution; except so far as the want of such care and caution may affect the *bona fides* and honesty of the transaction. *Steinhart v. Boker*, 34 Barb. 436; *Seybel v. National Currency Bank*, 54 N. Y. (9 Sick.) 288; *Goodman v. Simonds*, 20 How. (U. S.) 343; *Murray v. Lardner*,

2 Wall. 110; *Harrison v. Vought*, 34 N. J. (Law) 187; *Phelan v. Moss*, 67 Penn. St. 59; 5 Am. Rep. 402; *Taylor v. Atkinson*, 54 Ill. 196; *Comstock v. Hannah*, 76 id. 530; *Lake v. Reed*, 29 Iowa, 258; 4 Am. Rep. 209.

Where there is a total want of consideration for a promissory note, bill of exchange, or check, that fact may always be shown to defeat a recovery thereon, if the defense is interposed while the matter is between the original parties. So, between the immediate parties to a bill, note, or check, it will always be a good defense to show that the instrument was obtained by duress, by fraud, by false pretenses, or while the defendant was in a state of complete intoxication, or it may be shown that the note was deposited as an escrow, and that it was delivered in violation of that agreement, or that the note was not to become operative until a specified condition has been performed. *Ante*, 438; *Moore v. Cockcroft*, 4 Duer, 133.

No action can be maintained upon a note which was obtained by the fraud of the payee and holder. *Barber v. Kerr*, 3 Barb. 149; *Walker v. Squires*, Hill & Denio, 23; *New York and Virginia, etc., Bank v. Gibson*, 5 Duer, 574; *Linn Rock Bank v. Hewett*, 50 Me. 267.

If a promissory note is given to a vendor on the sale of goods and chattels, and he fraudulently represented the goods to be of great value, when they were in fact worth nothing, the vendor cannot maintain an action upon such note. *Sill v. Rood*, 15 Johns. 230; *Shepherd v. Temple*, 3 N. H. 455. If the vendor was guilty of a fraud in obtaining the note by a fraudulent sale of goods, or by perpetrating any other fraud upon the maker of the note, such vendor cannot recover upon the note. And in such cases of fraud the purchaser need not offer to return the goods in order to maintain his defense, if he can show that the goods are of no value whatever. *Burton v. Stewart*, 3 Wend. 236.

But, in ordinary cases, if the goods are of any value, the purchaser ought to return, or offer to return, them to the vendor, if he would make a complete defense to an action upon the note. *Ib.* The purchaser may, however, retain the property, and if there was a fraud or a warranty in relation to the sale of the goods which constitutes the consideration of the note, he may, as against the vendor, if he sues upon the note, recoup the damages arising from the fraud or warranty, and thus diminish the amount of the recovery upon the note. When it is import-

ant to rescind a contract, the law must be complied with. See Rescission.

Where a bill is accepted, or a promissory note is given, and the consideration for such bill or note is an executory promise of the drawer of the bill, or the maker of the note, to do some future act, such consideration is sufficient to render the instrument valid in the hands of one who paid full value for it, although he knew of the agreement, but did not know of the breach thereof, at the time of his purchase. *Davis v. McCready*, 17 N. Y. (3 Smith) 230, 232. "If one will issue his negotiable paper and send it into the world, in consideration of an engagement of the party with whom he deals to do some act for his benefit in future, he declares in effect that he will pay the note or bill according to its terms to any one who shall become the holder, for value, in the course of business, and rely for his own indemnity upon the promise he has received as the consideration for issuing it." *Ib.*, DENIO, J.

Before an action upon a bill or note can be defeated entirely and absolutely, it must be shown that it was obtained by fraud, or that the consideration is illegal, or that there never was any consideration whatever, or that if there once was a consideration that it has totally failed. If there is any consideration whatever that will be sufficient to sustain the action. And where a vendor sells goods or chattels without warranty, and without any fraud on his part, he may recover upon a promissory note given for the purchase price, although the article sold turns out to be a different one from what it was supposed to be, and although it is nearly worthless. *Welsh v. Carter*, 1 Wend. 185; *Johnson v. Titus*, 2 Hill, 606.

Mere inadequacy of consideration is no defense to a bill or note, though a total want or failure of consideration is a full defense, and a partial failure thereof is a good defense so far as it is proved. The general rule is, that no action will lie upon a bill or note founded upon an illegal consideration as between the original parties to it. So it is a general rule that when a negotiable instrument has passed into the hands of a *bona fide* holder, for value, in the ordinary course of business, he may recover upon it. There are some exceptions to the latter rule in those cases in which the statute declares the note void, as in cases of usury. See Illegality.

No person is considered to be a *bona fide* holder of negotiable paper unless he acquires it before it becomes due, in good faith,

and for value. If a bill or note is dishonored by its non-payment, this is sufficient to put a person who proposes to take it upon his guard, and to require him to make inquiries about it. If he takes it without such inquiry, he will take it subject to all the equities existing against it, and his only remedy will be against the person transferring the paper to him. *Farrington v. Park Bank*, 39 Barb. 645. A holder of negotiable paper in good faith is one who purchases or receives it without notice or knowledge of the facts or circumstances which tend to impeach its validity, or to diminish the amount recoverable upon it. If a person takes negotiable paper before it is due, but with full knowledge of the facts and circumstances which impeach its validity, he cannot recover upon it, although he paid full value for it. So, in every case, the holder of a bill must have given value for it, if he would avoid existing equities, even when taken before due. And when the holder claims to hold negotiable paper as against the true owner, from whom it has been stolen, he must always show himself to be a purchaser in good faith and for value.

Accommodation paper stands upon grounds somewhat different from other negotiable instruments. If an accommodation bill or note is made and put into circulation, the holder who has advanced the money upon it may recover upon it against any of the parties to it, notwithstanding there was no consideration for it, as between the parties to it, and although no action could have been maintained upon it between the original parties. When paper of that kind is put into circulation it is both a request to advance the money upon it and a promise to repay the amount so advanced, and this is a sufficient consideration to bind any one whose name is upon the instrument as a party to it. *Ante*, 92, 100. The person for whose accommodation a promissory note is made or indorsed, or for whom a bill of exchange is accepted, is bound to indemnify the maker, indorser or acceptor, as the case may be. *Wright v. Garlinghouse*, 26 N. Y. (12 Smith) 539, reversing S. C., 27 Barb. 474; *Suydam v. Westfall*, 2 Denio, 205.

The person for whose benefit an accommodation bill or note has been made can never recover upon it as against any of the persons who made, indorsed or accepted such paper for his use and benefit. *Thurman v. Van Brunt*, 19 Barb. 409. In the case of an accommodation bill, the acceptance is *prima facie* evidence that the acceptor has funds of the drawer in his hands;

but this presumption may be rebutted. So, the making of an accommodation note is *prima facie* evidence of an indebtedness of the maker to the payee, though this presumption is also liable to be rebutted. If the accommodation maker, indorser or acceptor is compelled to pay the paper so made, indorsed or accepted by him, he may recover the amount from the person for whose accommodation it was made. But, in such a case, the action is not founded upon the accommodation paper, but for money paid; in which case the instrument will become a part of the evidence to show the defendant's liability. *Bonney v. Seely*, 2 Wend. 481; *Ainslee v. Wilson*, 7 Cow. 668; *Suydam v. Westfall*, 2 Denio, 205; *Wright v. Garlinghouse*, 26 N. Y. (12 Smith) 539. The complaint may, however, state all the facts showing the defendant's liability, including a copy of the accommodation paper. *Ib.*; 27 Barb. 474.

ARTICLE X.

PRESENTMENT FOR ACCEPTANCE.

Section 1. In general. The contract of a drawer of a bill of exchange is a promise or agreement on his part to the drawee, or to any other person to whom it may afterward be transferred, that the drawee is legally competent to accept the bill and of rendering himself liable to its payment; that the drawee will duly and legally accept it, that he will pay it on proper presentment for payment, and that, if the drawee fails to do either of these things, the drawer will pay the amount of the bill with legal damages, provided he has due notice of the dishonor. The theory upon which a bill of exchange is founded is, that the drawer has money in the hands of the drawee, which the bill directs such drawee to pay over to the payee or order. Upon this assumption, the law implies a mere conditional contract on the part of the drawer, which is, that he will pay the bill if it is dishonored, and he is duly notified that the drawee refuses to accept, or refuses to pay the bill at maturity.

If the drawer has funds in the hands of the drawee, or if the latter had agreed to accept the bill, the drawee has a right to expect that the bill will be accepted or honored, and the law permits him to act upon that supposition. And for this reason, the law also provides that he shall have prompt notice of the non-acceptance or non-payment of his bill, so that he may take proper measures for his own security.

It is the duty of the payee of a bill of exchange to present it for acceptance to the right person, at the right time and place, and in a proper manner. And he has a right to expect that the bill will receive an immediate, full and unconditional acceptance. If the drawee refuses to accept the bill, even when he has sufficient funds of the drawer in his hands to pay it, this will not give the payee any right of action against the drawee. *Luff v. Pope*, 5 Hill, 413; 7 id. 577; *N. Y. and Virginia State Bank v. Gibson*, 5 Duer, 575; *Harris v. Clark*, 3 Comst. 93.

If the bill is drawn payable at sight, or a certain number of days or months after sight, or after demand, the presentment is necessary for the purpose of determining the time when it will become payable; and since the law has not prescribed any particular time within which such a bill is to be presented for acceptance, in order to charge the drawer and indorsers, it therefore merely requires that it shall be presented within a reasonable time, and leaves it to the court to determine in each case what is a reasonable time under its peculiar circumstances. *Aymar v. Beers*, 7 Cow. 705; *Sice v. Cunningham*, 1 id. 397; *Robinson v. Ames*, 20 Johns. 146; *Batchellor v. Priest*, 12 Pick. 399; *Wallace v. Agry*, 4 Mason, 336; 5 id. 118.

A check or draft must be presented within a reasonable time. *Veazie Bank v. Winn*, 40 Me. 60; *East River Bank v. Gedney*, 4 E. D. Smith, 582; *Woodin v. Frazee*, 6 J. & Sp. 190; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501; *Werk v. Mad River Bank*, 8 Ohio St. 301. What is a reasonable time depends upon the circumstances of the case. *Fugitt v. Nixon*, 44 Mo. 295; *Walsh v. Dart*, 23 Wis. 334; *Knott v. Venable*, 42 Ala. 186.

If the bill is drawn payable so many days or months after date, or on a day certain, the payee need not present it for acceptance until maturity, even for the purpose of charging the drawer and indorsers. *Plato v. Reynolds*, 27 N. Y. (13 Smith) 586; *Washington v. Triplett*, 1 Peters, 25; *House v. Adams*, 48 Penn. St. 261; *Walker v. Stetson*, 19 Ohio St. 400. It is, however, usual and better in such a case, for the owner of a bill to present it at an early day for acceptance, because if it is accepted, he thereby acquires the additional security of the drawee or acceptor; and if he refuses to accept, recourse may be had immediately to the drawer and indorsers for payment. A bill of exchange payable at a time certain need not be presented for acceptance until maturity; but if it is dishonored, notice and protest is necessary. *Bank of Bennington v. Raymond*, 12 Vt.

401; *Glasgow v. Copeland*, 8 Mo. 268; *Carmichael v. Pennsylvania Bank*, 4 How. (Miss.) 567.

A holder need not present a bill before its maturity; but if he presents it, and acceptance is refused, he is bound to give immediate notice. *Landrum v. Trowbridge*, 2 Metc. (Ky.) 281. Upon presentment, non-acceptance and notice, the holder may sue the drawer without waiting for the maturity of the bill. *Watson v. Tarpley*, 18 How. (U. S.) 517.

The presentment of a bill for acceptance ought to be made during the usual business hours of the day, or between morning and bed-time in the evening. *Cayuga Co. Bank v. Hunt*, 2 Hill, 635; *Nehon v. Fotteral*, 7 Leigh, 179; *Parker v. Gordon*, 7 East, 385; *Elford v. Teed*, 1 Maule & Selw. 28; 6 id. 44. If made at a bank, it should be made during the usual banking hours. *Newark India Rubber Co. v. Bishop*, 3 E. D. Smith, 48; though, see *Bank of Syracuse v. Hollister*, 17 N. Y. (3 Smith) 46.

If a bill is addressed to the drawee at a particular place, the presentment ought to be made at that place; and if the drawee has removed to another part of the same city, it is the duty of the holder to make diligent inquiry as to his place of business or residence, and presents it to him there for acceptance. *De-Wolf v. Murray*, 2 Sandf. 166; *Cayuga County Bank v. Hunt*, 2 Hill, 635; *Wilkins v. Jadis*, 2 Barn. & Ad. 188.

But if the bill is not addressed to any particular place, the presentment should be made at the residence or domicile of the drawee without reference to the place where it is payable. And if the drawee has removed to another place of residence in the same State, the holder should make diligent search and inquiry for him, and present the bill at his place of business or residence for acceptance. *Taylor v. Snyder*, 3 Denio, 145; *Anderson v. Drake*, 14 Johns. 114; *Woodworth v. Bank of America*, 19 id. 391; *Ratcliff v. Planters' Bank*, 2 Sneed, 425; *Pierce v. Struthers*, 27 Penn. St. 249. Where the maker of a promissory note within this State removes therefrom, and continues to reside abroad until its maturity, the indorser may be charged without a demand of such maker, or presentment at his last place of residence. *Foster v. Julien*, 24 N. Y. (10 Smith) 28; *Taylor v. Snyder*, 3 Denio, 145; *McGruder v. Bank of Washington*, 9 Wheat. 598; *Gillespie v. Hannahan*, 4 McCord, 503; *Gist v. Lybrand*, 3 Ohio, 307; *Holtz v. Boppe*, 37 N. Y. (10 Tiff.) 634; 5 Trans. App. 110; see *Gates v. Beecher*, 60 N. Y. (15 Sick.) 518. The presentment of a bill ought to be made to the drawee himself,

or to his duly authorized agent. *Sharpe v. Drea*, 9 Ind. 281. And if presented to an agent, the burden of proof as to the agency will be on the party presenting the bill. *Cheek v. Roper*, 5 Esp. 175.

A bill ought to be left with the drawee for twenty-four hours, if he desires it; because he may wish or need that time to examine the state of the accounts between himself and the drawer, before he can properly determine whether he has funds sufficient to authorize an acceptance by him. *Case v. Burt*, 15 Mich. 82.

"Every person upon whom a bill of exchange is drawn, and to whom the same is delivered for acceptance, who shall destroy such bill, or refuse, within twenty-four hours after such delivery, or within such period as the holder may allow, to return the bill, accepted, or non-accepted, to the holder, shall be deemed to have accepted the same. 1 R. S. 722, § 11, Edm. ed. The general rule is that the presentment for acceptance should be made by the rightful holder or owner, or by his duly authorized agent. If the drawee accepts the bill he will be bound, though it may be presented by one not having authority to present it. But in such a case he is not precluded from afterward disputing the genuineness of the succeeding indorsements, for his acceptance merely admits the genuineness of the drawer's signature. *Canal Bank v. Bank of Albany*, 1 Hill, 287. Where a bill is drawn upon two persons who are not partners, it ought to be presented to both of them for acceptance, since neither of them can bind the other, in such a case. *Willis v. Green*, 5 Hill, 232; *Shepard v. Hawley*, 1 Conn. 370. The rule is otherwise as to partners, for any one of them may accept bills in the firm name, if within the scope of the firm business. *Cayuga County Bank v. Hunt*, 2 Hill, 635; *Bank v. Loneragan's Adm'r*, 21 Mo. 46.

ARTICLE XI.

ACCEPTANCE OF BILLS.

Section 1. In general. An acceptance is an engagement to pay a bill according to the tenor of the acceptance; and a general acceptance is an engagement to pay according to the tenor of the bill. A bill can only be accepted by the drawee, and not by a stranger, except for honor. *Nicholls v. Diamond*, 9 Exch. 157; *Lindus v. Brodwell*, 5 C. B. 583; *Polhill v. Walter*, 3 B. & Ad. 114; *Eastwood v. Bain*, 3 H. & N. 738; *Davis*

v. *Clarke*, 6 Q. B. 16. If a bill is drawn upon several persons not in partnership, it should be accepted by all, and, if not, may be treated as dishonored. *Dupays v. Shepherd*, Holt's Rep. 297. Acceptance will, however, be binding upon such of them as do accept. *Owen v. Von Uster*, 10 C. B. 318; *Nicholls v. Diamond*, 9 Exch. 154.

It can scarcely be too frequently repeated, that in the particular contract created by a bill of exchange, the acceptor is regarded as the principal debtor or contractor, while the drawer and indorsers are looked upon as his sureties; and this mode of considering the subject ought to be kept steadily in view, inasmuch as it will not merely facilitate a comprehension of the forms of pleadings applicable to bills, but must also conduce to a right appreciation of the liabilities of the various parties whose names are attached to such instruments. The drawee named in a bill of exchange is not legally a party to it until he accepts it. But the act of acceptance is like the making of a promissory note; the acceptor then becomes the principal debtor, and he is then liable to pay the amount mentioned in the bill to the payee or holder thereof when it becomes due. If the drawee has funds in his hands which belong to the drawer, he ought, according to mercantile usage, to accept the bill; but his legal obligation to do so is no greater than is that of a debtor to give a promissory note to his creditor for the sum due him.

Unless the drawee has actually accepted the bill, or made some valid agreement to do so, he is not liable to the payee or holder of the bill, notwithstanding he has sufficient funds of the drawer in his hands at the time. *Butterworth v. Peck*, 5 Bosw. 341; 25 N. Y. (11 Smith) 239; *Lowery v. Steward*, 3 Bosw. 505; *Chapman v. White*, 6 N. Y. (2 Seld.) 412; *Winter v. Drury*, 5 N. Y. (1 Seld.) 525; *Cowperthwaite v. Sheffield*, 3 Comst. 243. *Ante*, 503. The holder for value of a bill drawn in pursuance of a promise to accept by the drawee, and taken on the faith of such promise, may maintain an action in his own name against the drawee on his refusal to accept. *Barney v. Newcomb*, 9 Cush. 46. At common law a parol or verbal acceptance of a bill of exchange is valid, and will bind the acceptor. *Lumley v. Palmer*, 2 Strange, 1000; *Arnold v. Sprague*, 34 Vt. 402; *Leonard v. Mason*, 1 Wend. 522; *Edson v. Fuller*, 22 N. H. 183; *Lannan v. Smith*, 7 Gray, 150; *Stockwell v. Bramble*, 3 Ind. 428; *Williams v. Winans*, 2 Green, 339; *Ward v. Allen*, 2 Metc. (Ky.) 53; *Walker v. Lyde*, 1 Rich. 249; *Pierce v. Kittridge*,

115 Mass. 374; *Scudder v. Union National Bank of Chicago*, 51 How. Pr. 339, U. S. Court decision.

The usual manner of acceptance is for the drawee to write the word "Accepted" across the face of the bill, followed by the date and his signature. The date is not material unless the bill is payable at a certain number of days after sight or acceptance; and in such a case, the date ought to be added; but if this is not done at the time of accepting, the actual date may always be shown by parol evidence, which will have the same legal effect as though the date had been written. The statute of New York has prescribed certain rules in relation to the acceptance of bills, which are the controlling law upon the subject in that State:

"No person within this State shall be charged as an acceptor of a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent." 1 R. S. 722, § 6, Edm. ed.

"If such acceptance be written on a paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who, on the faith thereof, shall have received the bill for a valuable consideration." Id., § 7.

"An unconditional promise in writing, to accept a bill before it is drawn, shall be deemed an actual acceptance in favor of every person who, upon the faith thereof, shall have received the bill for a valuable consideration." Id., § 8.

"Every holder of a bill presenting the same for acceptance, may require that the acceptance be written on the bill. A refusal to comply with such request shall be deemed a refusal to accept, and the bill may be protested for non-acceptance." Id., § 9.

"The last four sections shall not be construed to impair the right of any person to whom a promise to accept a bill may have been made, and who, on the faith of such promise, shall have drawn or negotiated the bill, to recover damages of the party making such promise, on his refusal to accept such bill." Id., § 10. Under section 8 of this statute, a promise to accept a draft drawn by a party is equivalent to an acceptance. *Johnson v. Clark*, 39 N. Y. (12 Tiff.) 216; *Merchants' Exchange National Bank v. Cardozo*, 3 J. & Sp. 162.

Under these provisions of the statute, an acceptance will be valid and sufficient, if the drawee merely writes his name across the face of the bill. *Spear v. Pratt*, 2 Hill, 582. But this was the rule before the statute was enacted. *Ib.*

A check ought to be presented for payment within a reasonable time. *Cowing v. Altman*, 1 S. C. (T. & C.) 494; *Nunnemaker v. Lanier*, 48 Barb. 234; *Kelly v. Second National Bank*, 52 id. 328; *Syracuse, etc., R. R. Co. v. Collins*, 3 Lans. 29; 57 N. Y. (12 Sick.) 641.

A check is not intended to be accepted like a bill of exchange, but is expected to be paid on presentment for that purpose by the payee or holder. But where a check is drawn upon a bank, a practice has been adopted which is nearly or quite equivalent to an acceptance of a bill. If a check is drawn upon a bank, and one of its officers, who is authorized to certify checks, writes a certificate upon such check, declaring that it is "good," this is equivalent to an acceptance of a bill, or of a promise to pay the amount to the payee or holder of the bill. *Willeys v. Phoenix Bank*, 2 Duer, 121; *Meads v. Merchants' Bank*, 25 N. Y. (11 Smith) 143. It is not a mere promise that the bank has the money to pay the check at the time of certifying it, but an absolute promise to retain the money, and to pay the check in all events. *Ib.* In such a case, the bank is primarily liable to the holder, until it is discharged by payment, release, or the statute of limitations. *Ib.*

If the paying teller of a bank improperly certifies that a check is "good," in a case in which the drawer has not funds in the bank to meet or pay the check, the bank will still be liable to pay the amount of the check to a *bona fide* holder for value. *Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*, 16 N. Y. (2 Smith) 125; S. C., 4 Kern. 623. In such a case, the bank will be liable, notwithstanding the check was certified by the teller in violation of his duty, for the mere accommodation of the drawer, and upon his promise that it should never be presented for payment. *Ib.* But the bank is not liable upon such a certified check, to one who is not a *bona fide* holder and for value. *Meads v. Merchants' Bank of Albany*, 25 N. Y. (11 Smith) 143. If the check shows upon its face that it has been improperly certified, the holder cannot recover upon it, because he cannot hold it in good faith when the instrument itself gives notice of its defects. *Clafin v. Farmers and Citizens' Bank*, 25 N. Y. (11 Smith) 293. When a bank gives its president power to certify checks, this does not authorize him to certify his own checks, so as to bind the bank, when the checks show upon their face that he is the drawer. *Ib.* See Banks and Banking, as to the presentment of checks, and their certification.

When no words of restraint or limitation are expressed in an acceptance of a bill of exchange, it is an absolute or general acceptance, and is an absolute agreement to pay in money according to the tenor and effect of the bill. *Smith v. Muncie Bank*, 29 Ind. 158. And it cannot be shown by parol that the acceptance was not absolute. *Haverin v. Donnell*, 7 Sm. & Marsh. 244. The drawer or indorser of a bill of exchange which specifies its place of payment only by its address to the drawee at a city named, is not discharged by its acceptance payable at a particular bank in that city. *Troy City Bank v. Lawman*, 19 N. Y. (5 Smith) 477; *Myers v. Standart*, 11 Ohio St. 29; *Niagara Bank v. Fairman*, 31 Barb. 403.

A bill cannot legally be drawn payable upon a contingency; but there may be a valid conditional acceptance. *Smith v. Abbot*, 2 Strange, 1152; *Julian v. Shobrooke*, 2 Wils. 9; *Smith v. Vertue*, 9 C. B. (N. S.) 214. And when a bill is accepted and payable upon the happening or performance of certain specified conditions, the acceptance will become absolute as soon as the specified conditions are performed, but not until that time. *Liggett v. Weed*, 7 Kans. 273.

A holder is not bound to receive a conditional acceptance, but if he does so, he will be bound to abide by its terms. *Gammon v. Schmoll*, 5 Taunt. 353; *Parker v. Gordon*, 7 East, 385. Where a bill is accepted, to be paid when in funds, or when money is received from a specified source, and the payee does not object to such acceptance, he cannot resort to the drawer until the acceptor refuses to pay, after the receipt of funds in the manner specified. *Gallery v. Prindle*, 14 Barb. 186; *Campbell v. Pettingill*, 7 Greenl. 126; *Andrews v. Bagg*, Minor, 173. If the holder accepts a conditional acceptance which varies from the tenor of the instrument, this will discharge the indorsers. *Walker v. Bank of State of New York*, 13 Barb. 636; S. C., 9 N. Y. (5 Seld.) 582; *Niagara Bank v. Fairman, etc.*, 31 Barb. 405; *Rowe v. Young*, 2 Brod. & Bing. 165.

Where a bill of exchange is transmitted to an agent for presentment for acceptance, such agent has no authority to accept a conditional acceptance, and if the drawee accepts the bill in any other manner than by an explicit and unequivocal acceptance, it is the duty of such agent to give notice to the holder as in the case of non-acceptance, and he will be liable to the holder for any loss which he may sustain from a neglect to do so. *Ib.* When the drawee intends to accept a bill conditionally, he ought

to express the condition in the written acceptance, for parol evidence is not admissible to change its terms, and clearly so, as against a *bona fide* holder for value. *Bank of Albion v. Smith*, 27 Barb. 489; *Haverin v. Donnell*, 7 Smedes & Marsh. 244.

Though a bill of exchange is payable at a particular place, it is not necessary for the holder in an action thereon against the maker or acceptor, to aver or prove a demand of payment of the acceptor at that place. *Foden v. Sharp*, 4 Johns. 183; *Wolcott v. Van Santvoord*, 17 id. 248; *Caldwell v. Cassidy*, 8 Cow. 271; *Haxtun v. Bishop*, 3 Wend. 13, 20; *Dockray v. Dunn*, 37 Me. 442; *Carter v. Smith*, 9 Cush. 321; *Middleton v. Boston Locomotive Works*, 26 Penn. St. 257; *Reeve v. Peck*, 6 Mich. 240; *Martin v. Hamilton*, 5 Harr. 314, 329; *Hubbell v. Lord*, 9 Tex. 472; *McKenzie v. Durant*, 9 Rich. (Law) 61.

In an action against an indorser upon a note payable at a particular place, presentment must be alleged to have been made at the place specified. *Ferner v. Williams*, 37 Barb. 9; 14 Abb. 215; *Lawrence v. Dobyns*, 30 Mo. 196; see *Troy City Bank v. Grant, Hill & Denio*, 119. But the acceptor may defeat the action by alleging and proving that he was ready to pay at the place according to the terms of his acceptance (*ib.*; *Green v. Goings*, 7 Barb. 652), or that he has been injured by a failure to make such demand. *Freeman v. Curran*, 1 Minn. 169; *Nicholls v. Pool*, 2 Jones (L.), 23.

The acceptor is presumed to know the handwriting of the drawer, and if he accepts a bill with a forged signature of the drawer, he will be liable to pay the amount to a *bona fide* holder of the bill for value. *Ante*, 508, 600.

ARTICLE XII.

PROCEEDINGS ON NON-ACCEPTANCE.

Section 1. In general. Where the drawee of a bill of exchange refuses to accept it, the holder is required to take the same steps in relation to such non-acceptance that he is bound to take in relation to a bill or note in case of its non-payment upon a proper presentment for payment. The principles which govern the giving of notices for non-acceptance are precisely the same as those relating to the non-payment of bills and notes.

Each of the successive indorsers of a bill is regarded as a new drawer, and his contract is an agreement to pay the bill upon certain conditions, and, in ordinary cases, these conditions are

that the payee or holder will duly present the bill to the drawee for acceptance, and if accepted, for payment at maturity, and that in case the bill is dishonored by non-acceptance or by non-payment, that due notice thereof shall be given to such drawer or indorser.

The general rule is, that a failure by the holder to give to the drawer or indorser due notice of non-acceptance, or non-payment, will discharge them from all liability on the bill.

The reason why this notice is required is, that the drawers or indorsers may take the proper steps to secure or protect themselves, in case of the non-acceptance or non-payment of the bill.

If the drawee refuses to accept or pay a bill on proper presentment, and due notice is given to the drawers, they will then have an opportunity of preventing a further accumulation of their funds in the hands of the drawee, or of withdrawing such as may then be in his hands, or the indorsers may be able to obtain security or payment from any prior parties who are liable to them. The object of the rule which requires notice is thus evident, but when the reason for the rule ceases, or when it does not exist, the rule itself ceases to be applicable. And, therefore, no notice is required in those cases in which a want of notice could not possibly do the drawers or indorsers any injury. If the indorser is the actual debtor, and the bill was discounted for his accommodation, and he received the money raised on the bill, he is not entitled to notice of dishonor; and the rule is the same where the indorser has taken into his own hands the entire effects of the acceptor, or a sufficient quantity thereof to indemnify him. *Mechanics' Bank v. Griswold*, 7 Wend. 165; *Barton v. Baker*, 1 Serg. & Rawle, 334; *Duvall v. Farmers' Bank*, 9 Gill & Johns. 31. But merely taking a judgment or of security by an indorser from the acceptor of a bill, or the maker of a note, does not dispense with a proper demand and notice, unless it appears that funds sufficient to pay the bill or note have come to the hands of the indorser, or that all the property of the acceptor or maker has been transferred to the indorser. *Seacord v. Miller*, 13 N. Y. (3 Kern.) 55; *Taylor v. French*, 4 E. D. Smith, 458; *Spencer v. Harvey*, 17 Wend. 489; *Marine Bank v. Smith*, 18 Me. 99; *Woodman v. Eastman*, 10 N. H. 359; *Cramer v. Perry*, 17 Pick. 332; *Kramer v. Sanford*, 4 Watts & Serg. 328; *Kyle v. Green*, 14 Ohio, 495; *Watkins v. Cranch*, 5 Leigh, 522; *Durham v. Price*, 5 Yerg. 300; *Watt v. Mitchell*, 6 How. (Miss.) 131; *Denny v. Palmer*, 5 Ired. 610. The general presumption is, that the

drawer or indorser has been injured by the want of a proper and legal notice that the bill has been dishonored, and, *prima facie*, they are discharged if such notice is not given; but this presumption may be rebutted by evidence; and if the holder shows affirmatively that no injury was sustained in consequence of the omission to give notice, he may recover. *Commercial Bank of Albany v. Hughes*, 17 Wend. 94. So, where the drawer of a bill has no funds in the hands of the drawee, and he knows that fact at the time of drawing the bill, and he has no right to expect that the bill will be accepted or honored, he is not entitled to notice of such dishonor. *Franklin v. Vanderpool*, 1 Hall, 78; *Coyle v. Smith*, 1 E. D. Smith, 400; *Bickerdike v. Bollman*, 1 Term R. 405; *Warder v. Tucker*, 7 Mass. 452; *Rhett v. Poe*, 2 How. (U. S.) 457; *Eichelberger v. Finley*, 7 Harr. & Johns. 381; *Foard v. Womach* 2 Ala. 368; *Cook v. Martin*, 5 Sm. & Marsh. 379; *Spear v. Atkinson*, 1 Ired. 262. The mere want of funds is not of itself a sufficient excuse for the want of notice, if it appears that the drawer had a reasonable expectation that the bill would be accepted and paid. *Stanton v. Blossom*, 14 Mass. 110; *Robinson v. Ames*, 20 Johns. 146; *Campbell v. Pettengill*, 7 Greenl. 126; *Austin v. Rodman*, 1 Hawks, 195; *Hill v. Norris*, 2 Stew. & Port. 114; *Dunbar v. Tyler*, 44 Miss. 1. So, if the drawer and the drawee have large dealings with each other, and the balances between them are fluctuating, or if from any arrangements of the drawer he has reason to believe that he will have funds in the hands of the drawee when the bill becomes due, he is entitled to notice, as, for instance, when the drawer had consigned effects or goods to the drawee to pay the bill, though they may not have come to hand at the time when the bill was presented for acceptance. *Legge v. Thorpe*, 12 East, 171; *Rucker v. Hiller*, 16 id. 43. Want of funds in the hands of the drawee may dispense with notice of dishonor to the drawer of the bill; but the rule is otherwise as to an indorser of the bill, who is entitled to such notice of dishonor notwithstanding the want of funds. *Warden v. Tucker*, 7 Mass. 450; *Norton v. Pickering*, 8 B. & C. 610; *Barton v. Baker*, 1 Serg. & Rawle, 334; *Warder v. Tucker*, 7 Mass. 452; *Scarborough v. Harris*, 1 Bay, 178; *Denniston v. Imbrie*, 3 Wash. C. C. 401.

The burden of proof is on the holder of a bill to show that the drawer had no funds in the drawee's hands, in order to excuse want of notice. *Thompson v. Stewart*, 3 Conn. 172;

Ralston v. Bullits, 3 Bibb, 261; *Baxter v. Graves*, 2 A. K. Marsh. (Ky.) 152.

An accommodation drawer is entitled to notice, even though he had no funds in the hands of the drawee. *Merchants' Bank v. Easley*, 44 Mo. 286.

Fraud in the other parties to a bill does not deprive an indorser of his right to notice, where he is not privy to the fraud. *Leach v. Hewitt*, 4 Taunt. 731.

The death of the drawee may render a presentment for acceptance fruitless and unnecessary, but it does not dispense with the necessity of giving a timely and proper notice of the dishonor of the bill. Neither does the death of the drawer or indorser discharge the holder from his duty of giving a proper notice; but the notice must be sent to their representatives, if the holder knows or can ascertain who they are, and their address. *Cayuga County Bank v. Bennett*, 5 Hill, 236.

If the holder of a bill is not aware of the death of the drawer or indorser, he should give notice in the usual manner (*Merchants' Bank v. Birch*, 17 Johns. 25); and if he does know of the death of the indorser, notice may be given in the usual way, provided he does not know who are the legal representatives of such indorser. *Stewart v. Eden*, 2 Caines, 121.

"Whenever the residence or place of business of the indorser of a promissory note, or of the drawer or indorser of a check, draft or bill of exchange, shall be in the city or town, or whenever the city or town indicated under the indorsement or signature of such indorser or drawer, as his or her place of residence, or whenever, in the absence of such indication, the city or town where such indorser or drawer, from the best information obtained by diligent inquiry, is reputed to reside or have a place of business, shall be the same city or town where such promissory note, check, draft or bill of exchange is payable or legally presented for payment or acceptance, all notices of non-payment and non-acceptance of such promissory note, check, draft or bill of exchange may be served by depositing them, with the postage thereon prepaid, in the post-office of the city or town where such promissory note, check, draft or bill of exchange was payable or legally presented for payment or acceptance, directed to the indorser or drawer at such city or town." Laws 1857, ch. 416, § 3.

An indorser may designate the street and number of his residence, and if he continues to reside there, notice of protest,

served under this section, must be directed to him at that place. *Bartlett v. Robinson*, 39 N. Y. (12 Tiff.) 187; 6 Trans. App. 159; 9 Bosw. 305. An indorser had resided for ten years in a city (Rochester) where a note was payable at one of its banks. Six months before the note fell due she removed to New York city. The plaintiff's agent made various inquiries shortly before the note became due, and among others of a relative of hers, and was informed that she still resided in the city. When the note was left at the bank for collection, the teller was informed that all the parties lived in Rochester, and he so advised the notary who protested the note. No inquiry was made in Rochester upon the day the note matured. Notice of protest was mailed to her addressed at Rochester. This was held to be proper under this statute. *Requa v. Collins*, 51 N. Y. (6 Sick.) 144. Depositing a notice of protest in a postal box attached to a lamp-post may, by a liberal construction of the statute (L. 1857, ch. 416, § 3), be regarded as equivalent to depositing the same in the post-office. *Greenwich Bank v. De Groot*, 7 Hun, 210. Thorough and careful inquiry as to the residence of the indorser is required where the notice is sent by mail. Merely following the address given in the city directory is not sufficient. *Ib.*

This statute does not apply to bills of exchange, checks, drafts or promissory notes bearing date prior to July 1, 1857, Laws 1857, ch. 416, § 4.

Where an indorser intends to charge previous indorsers, and they reside in different places, due diligence will have been used where notice is sent the day following that on which it is received; and the rule is the same, although the paper is indorsed from one agent to another for collection merely. *Farmers' Bank of Bridgport v. Vail*, 21 N. Y. (7 Smith) 485, 488; *Howard v. Ives*, 1 Hill, 263; *Burkhalter v. Second National Bank*, 42 N. Y. (3 Hand) 538. If a note is dishonored on Saturday, an indorser will be duly charged if the agent, who has the note for collection, is unable to ascertain such indorser's residence, and he mails notice of its non-payment to his principal on the following Monday, who, on the next day after receiving it, mails notice to his indorser. *Ib.*

The whole duty of the holder of a protested bill is discharged by notice to his immediate indorser; and all the parties to the bill or note will be charged, if they receive notice in due course from their immediate subsequent indorsers. *West River Bank v. Taylor*, 34 N. Y. (7 Tiff.) 128; *Farmer v. Rand*, 16 Me. 453;

Eagle Bank v. Hathaway, 5 Metc. 212; *Butler v. Duval*, 4 Yerg. 265.

If the residence of the drawer or indorser is not known, it is the duty of the holder to use due diligence to ascertain it, and if he does so by inquiring of business men and persons likely to know, and having no interest in stating it erroneously, he is authorized to act upon the information so acquired, and though misled as to the fact, notice sent accordingly will be good. *Seneca County Bank v. Neass*, 3 Comst. 442. Under the statutes of this State, it will be sufficient if the notice is directed to the city or town where the person sought to be charged resided at the time of drawing, making or indorsing the note or bill, unless such person, at the time of affixing his signature to the instrument, specifies the post-office to which the notice is to be addressed. Laws 1835, ch. 141. And, since this statute, the holder is not bound to use due diligence in ascertaining the present residence of the drawer and indorser; it will be enough if the notice sent is addressed to the town or city in which he resides, or to the post-office in an adjoining town where he is in the habit of receiving his letters and papers, provided he has not specified a different place. *Downer v. Remer*, 21 Wend. 10; *Montgomery County Bank v. Marsh*, 7 N. Y. (3 Seld.) 481; *Hunt v. Fish*, 4 Barb. 324. When the known residence of an indorser is in the village where the note is held and made payable, notice of its dishonor cannot, under the statute of 1838, ch. 141, be served through the mail, directed to him at his place of business in another town; the notice should be served upon him personally, or by leaving it at his residence or place of business. *Van Vechten v. Pruyn*, 13 N. Y. (3 Kern.) 549. See the law of 1857, cited *ante*, 629.

The sudden illness or death of the holder or his agent, or other accident, may constitute an excuse for the want of regular notice to any of the parties, in case it is given as soon as possible after the removal of the impediment. So, the breaking out of a war, which blocks up the usual channels of communication; the prevalence of a malignant fever or other disease, that puts a stop to all business; and, in general, any such inevitable accident as prevents the giving of the notice, if not traceable to the neglect of the holder, will excuse the delay so long as the preventing cause continues. *Schofield v. Bayard*, 3 Wend. 488; *Patience v. Townley*, 2 J. P. Smith, 223; *Hopkirk v. Payn*, 2 Brock. 20;

House v. Adams, 48 Penn. St. 261; *Apperson v. Bynum*, 5 Coldw. 341; *Morgan v. Bank of Louisville*, 4 Bush, 82.

If a protest is made on Saturday, notice is properly sent on Monday, by the first mail that closes after the commencement of the ordinary hours of business. *Howard v. Ives*, 1 Hill, 263; *Farmers' Bank of Bridgeport v. Vail*, 21 N. Y. (7 Smith) 485. So, if the protest is made on the third day of July, the notice will be sufficient if it is sent on the fifth; or, if the last day of grace is on the 4th day of July, or on Sunday, the demand of payment must be made on the day previous. *Ransom v. Mack*, 2 Hill, 587; *Cuyler v. Stevens*, 4 Wend. 566; *Lewis v. Burr*, 2 Caines' Cas. 195. The rule is the same when the last day of grace is Thanksgiving day. *Ib.* "The following days, namely: the 1st day of January, commonly called New Year's day; the 22d day of February, known as Washington's birthday; the 30th day of May, known as Decoration day; the 4th day of July, called Independence day; the 25th day of December, known as Christmas day; any general election day; and any day appointed or recommended by the Governor of this State, or the President of the United States, as a day of Thanksgiving, or fasting and prayer, or other religious observance, shall, for all purposes whatsoever as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, made after the passage of this act, be treated and considered as the first day of the week, commonly called Sunday, and as public holidays; and all such bills, checks and notes otherwise presentable for acceptance or payment on the said day shall be deemed to be presentable for acceptance or payment on the secular or business day next preceding such holidays." Laws 1875, ch. 27, § 1.

§ 2. "Whenever the 1st day of January, the 22d day of February, the 30th day of May, the 4th day of July, or the 25th day of December, shall fall upon Sunday, the Monday next following shall be deemed a public holiday for all or any of the purposes aforesaid; provided, however, that in such case all bills of exchange, checks and promissory notes, made after the passage of this act, which would otherwise be presentable for acceptance or payment on the said Monday, shall be deemed to be presentable for acceptance or payment on the Saturday preceding." *Ib.*, § 2.

If a foreign bill is dishonored, it should be protested, and information of the protest sent with the notice. But inland bills

and notes need not be protested, although it may be done. If protested, the notary must conform to the statutes in his mode of action. It is the common practice for notaries to protest bills and notes, and to send notice of the non-acceptance or the non-payment to the drawers and indorsers.

But, although a protest is not necessary, it is necessary that notice of non-acceptance should be given to the parties sought to be charged ; and such notice ought to state, in express terms, or by necessary implication, that the bill has been dishonored. The notice must so describe the bill as to identify it ; must be so drawn as to show that the bill has been duly presented for payment or acceptance, and refused or dishonored ; must be given in due time after the dishonor ; must be given by a party to the bill, or by some one duly authorized to perform the act ; and must be given according to the law of the place where the bill was drawn for the indorsement made. A notice which is dated and mailed on the next day after a note becomes due, if it states that the note "was this evening protested for non-payment, the same having been duly presented and payment demanded, which was refused," is sufficient in form, and is mailed in due time where the demand was made on the day preceding. *First National Bank of Groton v. Crittenden*, 2 S. C. (T. & C.) 118. Although no particular form of words is necessary in notifying a drawer or indorser, the notice will be bad unless it in some way imports that the bill or note has been dishonored. *Ransom v. Mack*, 2 Hill, 587. It must also show that the presentment was in proper time ; and a notice without date, which states that the note has been this day presented, is defective. *Wynn v. Alden*, 4 Denio, 163. See *De La Hunt v. Higgins*, 9 Abb. 422.

The notice need not be in writing, and no particular form of words is necessary to be used ; but the language employed must be such as to convey notice to the drawer or indorser that the bill has been dishonored ; and to do this it is essential that the notice should describe the bill, and show, either in express terms, or in words that necessarily convey information to the party notified, that acceptance or payment has been refused on due presentment. The essential facts to be stated in a notice of protest to bind the indorser are, that the note was not paid at maturity, that it has been protested for non-payment, and to identify the note. *Artisans' Bank v. Backus*, 36 N. Y. (9 Tiff.) 100 ; 1 Trans. App. 75 ; 3 Abb. (N. S.) 278.

When there is no dispute about the facts, the sufficiency of the notice is a question of law, to be determined by the court.

A notice of dishonor must, in general, come from the holder or his agent, or from a party to the bill, though it will be good if given by an indorsee who has transferred it as a collateral security for an existing debt; for such a person has a direct interest in the bill, and a right of recourse to the parties liable thereon, whenever the bill comes back into his hands. *Cowperthwaite v. Sheffield*, 1 Sand. 416; *Walmsley v. Acton*, 44 Barb. 312; *Bachelor v. Priest*, 12 Pick. 406; *Freemans' Bank v. Perkins*, 18 Me. 292. When a bill is drawn upon a firm by one of several partners, for matters relating to the partnership business, or when the drawers and acceptors are the same persons, no notice of protest need be given; for in each of these cases the party to be charged has notice of the dishonor of the bill so drawn in the very act of dishonoring it. *Gowan v. Jackson*, 20 Johns. 176; *Bank of Rochester v. Monteath*, 1 Denio, 402. A written unsigned notice is not sufficient. *Walmsley v. Acton*, 44 Barb. 312; *Klockenbaum v. Pierson*, 16 Cal. 375.

A bill of exchange which has been dishonored by non-acceptance need not be presented for payment. *Bank of Rochester v. Gray*, 2 Hill, 227. The contract of the drawer and indorser is, that the bill will be accepted when duly presented for that purpose, and as soon as that contract is broken by reason of the non-acceptance of the bill, the holder acquires a right of action on the bill by complying with the conditions of such contract. One of these conditions is that the bill shall be duly presented for acceptance, and the other is that notice of the drawee's refusal to accept shall be given to the drawer and indorsers. *Ante*, 618, 627.

By omitting either of these acts, the holder loses his right of recourse to these parties, who are thereby discharged. *Spies v. Gilmore*, 1 Comst. 321. So due presentment for payment, and notice of non-payment are conditions precedent to the liability of an indorser of a promissory note. *Cayuga County Bank v. Warden*, 1 Comst. 413; S. C., 2 Seld. 19. These omissions of the holder may, however, be waived by a subsequent promise to pay the bill or note, if the promise is made with full knowledge on the part of the drawer or indorser, that he has been discharged by the neglect of the holder. *Tebbetts v. Dowd*, 23 Wend. 379; *Cram v. Sherburne*, 14 Me. 48; *Martin v. Ingersoll*, 8 Pick. 1; *Beck v. Thompson*, 4 Harr. & Johns. 531; *Farring-*

ton v. Brown, 7 N. H. 271; *Porter v. Hadenpuyl*, 9 Mich. 11; *Blodgett v. Durgin*, 32 Vt. 361; *Robbins v. Pinckhard*, 5 Sm. & Marsh. 51; *Moore v. Tucker*, 3 Ired. 347; *Tobey v. Berly*, 26 Ill. 426. But nothing short of the clearest assent, either express or implied, will amount to a waiver. *Oswego Bank v. Knowler, Hill & Denio*, 122. A promise which is made in ignorance of the fact that no notice has been given will not be sufficient. *Jones v. Savage*, 6 Wend. 658; *Otis v. Hussey*, 3 N. H. 346; *Kennon v. McRea*, 7 Port. (Ala.) 175; *Fleming v. McClure*, 1 Brev. 428; *Hunt v. Wadleigh*, 26 Me. 271; *Hunter v. Hook*, 64 Barb. 468. A waiver of a notice of demand is no waiver of a demand, and does not dispense with the demand itself. *Backus v. Shipherd*, 11 Wend. 629; *Buchanan v. Marshall*, 22 Vt. 561; *Drinkwater v. Tebbits*, 17 Me. 16.

ARTICLE XIII.

PRESENTMENT FOR PAYMENT, AND PAYMENT.

Section 1. In general. In an action against the maker of a promissory note, or the acceptor of a bill of exchange, it is not necessary for the holder to allege in his complaint, or to prove at the trial that a demand of payment has been made. It is no part of the contract that they shall have notice in such cases; and as against them an action is a sufficient demand. *Foden v. Sharp*, 4 Johns. 183; *Wolcott v. Van Santvoord*, 17 id. 248; *Fairchild v. Ogdensburgh C. and R. R. Co.*, 1 E. P. Smith, 337; *Caldwell v. Cassidy*, 8 Cow. 271; *Hartun v. Bishop*, 3 Wend. 13; *Green v. Goings*, 7 Barb. 652; *ante*, 626.

Whether the instrument is drawn payable generally, or at a particular place, the holder is not bound to allege or prove a demand at any place; but if it is payable at a particular place, and no demand was made there, the defendant may show that he was ready to pay at that place, which, if established, will defeat the action. *Ib.* But where a note is payable at a particular place or bank, it will be a sufficient demand if the note is left at that bank for collection on the last day of grace, and if the maker has no funds there, it may be returned to the holder before the expiration of the last business hour. *Merchants' Bank v. Elderkin*, 25 N. Y. (11 Smith) 178.

If the maker of a promissory note, or the acceptor of a bill of exchange absconds, this will not change the contract, nor release the indorser from his obligations. The only effect of such an

event will be to require due diligence on the part of the holder in taking the proper steps to charge the indorsers. If the maker or acceptor has removed from the State or gone out of the country, after having made the note, the holder will be excused from demanding payment of him personally ; and a demand at the place where it is made payable, if payable at a particular place, will be sufficient. *Anderson v. Drake*, 14 Johns. 114 ; *Taylor v. Snyder*, 3 Denio, 145 ; *Adams v. Leland*, 30 N. Y. (3 Tiff.) 309. But where there has been no removal by the maker or acceptor after the making of the bill or note, the holder must present it to the maker or acceptor personally, or at his residence, or place of business, whether that be in this State where the instrument was made, or in a foreign country. *Ib.* ; *Spies v. Gilmore*, 1 Comst. 321. Where a note is made payable at a certain locality, without designation of a particular place therein, if the maker has no place of business or residence in the place where it is in general made payable, if the holder of the note is within such locality, on the day of payment, with the note, ready to receive payment, that is sufficient to constitute a presentment and demand. *Meyer v. Hibsher*, 47 N. Y. (2 Sick.) 265.

Neither the insolvency, nor the death of the maker of a promissory note, or the acceptor of a bill of exchange, is of itself sufficient to dispense with the necessity of a regular demand of payment. Where the maker or acceptor is dead, the demand ought to be made upon his personal representative ; unless the note is payable at a particular place, in which case it may be presented for payment at the place specified. *Willis v. Green*, 5 Hill, 232 ; *Stewart v. Eden*, 2 Caines, 121 ; *Merchants' Bank v. Birch*, 17 Johns. 25 ; *Philpott v. Bryant*, 3 Carr. & Payne, 244.

If the house of the maker or acceptor is closed, it is the duty of the holder to make diligent inquiry for him ; and in case of his removal to another residence in the same State, the holder must follow him there and present the bill or note for payment. *Anderson v. Drake*, 14 Johns. 114, 117. Where the bill or note specifies a place of payment, a presentment at that place will be sufficient, if made during the usual hours of business, though the place be closed, and there is no person there to pay it. *DeWolf v. Murray*, 2 Sandf. 166. Where the drawer of a bill has no effects in the hands of the drawee, and he has no reason to expect that the bill will be paid, a presentment of the bill for payment is not necessary for the purpose of charging him. *Mobley v. Clark*, 28 Barb. 390 ; *Terry v. Parker*, 6 Ad. & E. 502.

The same reasons which will excuse a presentment for acceptance, will also excuse presentment for payment. *Ante*, 627, 628.

A bill or note ought to be presented for payment by the holder or his authorized agent; and a person to whom a note or bill is indorsed or delivered for collection is to be regarded as the holder for the purpose of making such demand and of giving notice. *Mead v. Engs*, 5 Cow. 303; *Howard v. Ives*, 1 Hill, 263; *Farmers' Bank, etc. v. Vail*, 21 N. Y. (7 Smith) 485. The authority of an agent to demand payment need not be in writing, nor need it be in express terms; if he has the instrument in his possession, ready to be delivered up on payment thereof, that will be sufficient. A mere stranger to an instrument cannot charge the parties to it by giving them notice of its dishonor; though where a party comes into possession of such paper by accident, as by the death of an agent, he may, and ought to present it for payment, and give the proper notice of a refusal. And whenever a negotiable bill or note comes into the hands of any person under a blank indorsement, or when it is drawn payable to bearer, he is *prima facie* the holder, and entitled to demand and recover the amount due upon it. *James v. Chalmers*, 5 Sandf. 52; S. C., 6 N. Y. (2 Seld.) 209; *Mauran v. Lamb*, 7 Cow. 174. Where the holder dies before the note or bill becomes due, it ought to be presented by his legal representatives. And so, where the holder has assigned his personal estate for the benefit of his creditors, the presentment should be made by his assignee. *Jones v. Fort*, 9 Barn. & Cress. 764. And where a bill or note is turned out on a sale of goods, or as a collateral security, or for collection, there is an implied agreement on the part of the person receiving such bill or note, that he will present it in proper time for payment, and that he will take the necessary steps to charge the parties thereto; and if he neglects or refuses to do so, he will be liable for the loss resulting therefrom to the party turning out the paper. *Jones v. Savage*, 6 Wend. 658; *Allen v. Suydam*, 20 id. 321; *Walker v. Bank of State of New York*, 9 N. Y. (5 Seld.) 582; *Dayton v. Trull*, 23 Wend. 345.

The note or bill ought, as a general rule, to be presented to the same persons, at the same place, and in the same manner, as is requisite in the presentment for acceptance. *Ante*, 618. If a bill is addressed to the drawee at a particular place, and accepted in general terms, it will be sufficient to present it for payment at the place designated, within the usual hours of business; and if that place is closed, and there is no person there to give an

answer respecting the bill, the demand will charge the parties liable in case of a legal demand. *De Wolf v. Murray*, 2 Sandf. 166. So, where a note is made payable at a particular bank, in which the maker has no funds, and the note is delivered after business hours, on the last day of grace, to the teller of the bank, who is also a notary, a demand by such teller on the steps of the bank, which is then closed, will be sufficient to charge an indorser. *Bank of Syracuse v. Hollister*, 17 N. Y. (3 Smith) 46.

Where a bill or note is drawn payable at a particular place, and there is an action upon it against the drawer or indorser, it will be necessary to show that a presentment was made at the place named. *Seneca County Bank v. Neass*, 5 Denio, 329; *Woodworth v. Bank of America*, 19 Johns. 391. A note payable at a particular bank is sufficiently demanded if it is left there for collection on the day it becomes due; where the note is payable at a particular place, no personal demand is essential; it is the business of the maker to furnish funds at the place, ready to take up the paper on presentation on the day it falls due; and if the holder or his agent is there with it, so that he is in a situation to receive the money, and give up the note, that will be sufficient. *Troy City Bank v. Grant*, Hill & Denio, 119, 120; *Ogden v. Dobbin*, 2 Hill, 112; *Nichols v. Goldsmith*, 7 Wend. 160; *Gillett v. Averill*, 5 Denio, 85. If a bank is the owner of a bill or note payable there, the presumption will be, in the absence of proof of the contrary, that the instrument was at the bank ready to be delivered up on payment.

If a bill or note is payable at a specified bank, the demand of payment must be made at the bank; and it will not be sufficient to show that the note was presented to the cashier; it must appear that it was presented at the bank. *Seneca County Bank v. Neass*, 5 Denio, 329; S. C., 3 Comst. 442. If a promissory note is made, or a bill of exchange is accepted by several persons who are not partners, a demand of payment must be made upon each of them, in the usual manner personally, or at his dwelling-house, or his place of business.

The demand of payment may be made upon the maker or acceptor personally; but it must be made at a reasonable time and place. The legal presumption is, that the maker or acceptor is prepared at his residence or place of business to pay such an instrument; and if a demand is made in the street, while the maker or acceptor offers to pay it at his residence or place of business, the person making the demand is bound to give him an opportunity to do so.

A bill or note ought to be actually presented for payment; it should be shown to the maker or acceptor, and payment thereof demanded, unless in the case of a bill or note payable at a particular bank or place. *Ante*, 623. If a demand is made by a person who has not the bill or note in his possession the demand will not be sufficient. *Musson v. Lake*, 4 How. (U. S.) 262. The instrument itself ought to be produced and exhibited; for an acceptor has a right to see the bill before he determines whether he will pay it or not; and if he pays it, he has a right to demand its delivery to him as a voucher in his settlement with the drawer. *Bank of Vergennes v. Cameron*, 7 Barb. 143, 146. So, the maker of a promissory note has a right to demand the surrender of a promissory note on its payment by him. Both the bill and the note being negotiable instruments, neither the maker nor the acceptor is bound to pay it without receiving the note or bill as his voucher, or evidence that it is not outstanding in the hands of some other person. *Smith v. Rockwell*, 2 Hill, 482. So, an indorser, on tendering the amount due on a note, has a right to insist upon its delivery to him. *Wilder v. Seelye*, 8 Barb. 408; See above.

When a bill or a negotiable note has been lost, the presentment may be made by copy, or by a statement in writing describing the instrument; but, in order to charge the indorser of such a lost bill or note, the holder must tender an indemnity to both the maker and the indorser at the time of the demand, because as the former is not bound to make payment without the production of the note, or indemnity in case of its loss, for that very reason payment ought not to be required of the latter until the proper steps have been taken to secure his immediate recourse against his principal. *Smith v. Rockwell*, 2 Hill, 482; *Rowley v. Ball*, 3 Cow. 303; *Kirby v. Sisson*, 2 Wend. 550; *Ramuz v. Crowe*, 1 Exch. 167, 174, *note*. If the indorser sustains any injury in consequence of the holder's neglect in this respect, it will be a good defense to an action on the instrument. *Ib.* If the note is not lost, though it is supposed to be at the time of making the demand, it will be sufficient to produce it at the trial. *Ib.*

If the holder of a bill or note would charge the drawer or indorser thereof, he must present the instrument and demand payment on the very day on which it is legally payable. Where a note is payable on demand, or it specifies no time of payment, it is deemed to be due immediately, and the statute of limitations begins to run against it from the day of its date. *Wenman*

v. *Mohawk Ins. Co.*, 13 Wend. 267; *Cornell v. Moulton*, 3 Denio, 12; *Norton v. Ellam*, 2 Mees. & Wels. 461; *Thompson v. Ketcham*, 8 Johns. 190; *Herrick v. Bennett*, id. 374. Where a note is payable on demand, a demand must be made within a reasonable time in order to charge the indorser. *Sice v. Cunningham*, 1 Cow. 397; *Furman v. Haskin*, 2 Caines, 369; *Sanford v. Mickles*, 4 Johns. 224. But where a note is payable on demand, *with interest*, it is a continuing security, from which none of the parties are discharged until it is dishonored by an actual presentment and a refusal to pay. COMSTOCK, J., in *Merritt v. Todd*, 23 N. Y. (9 Smith) 28, 34; *Wethey v. Andrews*, 3 Hill, 582; *Weeks v. Pryor*, 27 Barb. 79. Where the parties to a note have their places of business in the same street of the same city, a note payable on demand with interest, which is transferred nearly three months after date, is subject, in the hands of the transferee, to any defense which existed in behalf of the makers against the payee before the transfer. *Herrick v. Woolverton*, 41 N. Y. (2 Hand) 581; 1 Am. Rep. 161. A promissory note, payable on demand, whether with or without interest, is barred by the statute of limitations, if not brought within six years after its date. *Wheeler v. Warner*, 47 N. Y. (2 Sick.) 519; 7 Am. Rep. 478.

Before a holder of a bill or note can safely make a demand of payment, it is important to know when that demand is to be made, and for that purpose he must ascertain on what day the law determines or declares the instrument to be due and payable. When checks, bills or drafts are payable on demand, they are payable immediately, and without any demand before suit brought. *Ib.*; *Haxtun v. Bishop*, 3 Wend. 13, 23, *note*.

It is a general rule that notes which are not negotiable are not entitled to days of grace. Notes not negotiable are such as are not drawn in negotiable terms; such as are payable in chattels; and such as are not recognized as negotiable either by statute or by custom.

Where a bill or note is drawn payable at a specified time, as on a certain future day, or a given number of days after date, after sight, after demand, or on any other particular day, mentioned in such bill or note, it is not payable at the time the words naturally import, but the acceptor or the maker has until the third day after, and exclusive of the day expressed, in which to make payments; and he has the whole of this third day in which to pay, and no action can legally be brought against him until

the next day. The maker of a promissory note has the whole of the last day of grace in which to pay it; and, if it is payable at a bank, no action can legally be commenced on it against the maker on the last day of grace, even though it is commenced after the banking hours of the bank at which it is payable. *Smith v. Aylesworth*, 40 Barb. 104; *Osborn v. Moncure*, 3 Wend. 170; *Oothout v. Ballard*, 41 Barb. 33. Thus, where a bill or note is made payable on the first day of any particular month, it will not be due until the fourth day of that month; and an action cannot properly be brought upon it until the fifth. *Cornell v. Moulton*, 3 Denio, 12; *McGraw v. Walker*, 2 Hilt. 404.

"All bills of exchange or drafts, drawn payable at sight, at any place within this State, shall be deemed due and payable on presentation, without any days of grace being allowed thereon." Laws 1857, ch. 416, § 1.

"All checks, bills of exchange or drafts, appearing upon their face to have been drawn upon any bank, or upon any banking association, or individual banker, carrying on banking business under the act to authorize the business of banking, which are on their face payable on any specified day, or in any number of days after the date or sight thereof, shall be deemed due and payable on the day mentioned for the payment of the same, without any days of grace being allowed, and it shall not be necessary to protest the same for non-acceptance." *Ib.*, § 2. This act only abolishes grace upon bills which are "*on their face* payable on a specified day, or in any number of days or sight thereof after the date. It does not include bills payable upon their face in months or years. *Commercial Bank of Kentucky v. Varnum*, 49 N. Y. (4 Sick.) 269. A draft for money payable at a day which is subsequent to its date is a bill of exchange, and entitled to days of grace. *Bowen v. Newell*, 8 N. Y. (4 Seld.) 190. A bill of exchange, drawn payable at sight, is due and payable on presentment to the drawee, in the absence of evidence of a local custom to change the rule. *Nash v. Martin*, 1 E. D. Smith, 505; 9 N. Y. Leg. Obs. 358.

ARTICLE XIV.

PAYMENT; BY WHOM.

Section 1. In general. The makers of a promissory note and the acceptors of a bill of exchange or draft are the persons primarily liable to pay it at its maturity; and payment thereof by

such makers or acceptors discharges them and the indorsers, and cancels the instrument. *Suydam v. Westfall*, 2 Denio, 205. The payment of a bill or note by an indorser is a satisfaction of it only in respect to subsequent indorsers; for a bill is not discharged and finally extinguished until paid by or on behalf of the acceptor; nor a note until paid by or on behalf of the maker. And, therefore, when an indorser takes up a dishonored note or bill, he is at liberty to put it again into circulation; whereas a payment by the maker of a note or the acceptor of a bill discharges it so that it is no longer negotiable. *Havens v. Huntington*, 1 Cow. 387. Payment ought to be made to the holder or real owner of the bill or note, or to some person authorized by him to receive it, and to one who has the title and possession of it. *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Morgan v. Bank of State of New York*, 11 N. Y. (1 Kern.) 404; *Davis v. Miller*, 14 Gratt. 1; *Farenc v. Bennett*, 11 East, 40. When a bill or note is payable to bearer, or if payable to order and indorsed in blank, so that the title passes by the mere act of delivery, possession alone is presumptive evidence of title and a sufficient authority to demand and receive payment. *James v. Chalmers*, 5 Sandf. 52; S. C., 6 N. Y. (2 Seld.) 209; *Seeley v. Engell*, 17 Barb. 530. And whenever the person presenting a bill or note has a right to demand its payment, the maker or acceptor is clearly authorized to pay it to such person.

There are cases in which payment may properly be made to the holder of a bill or note, even when it was obtained fraudulently or feloniously from the true owner. And the maker or acceptor will be protected in paying a note or bill to the party who presents it, if he holds it under such circumstances as will give him a right of action thereon as a purchaser in good faith and for value. *Stalker v. McDonald*, 6 Hill, 93.

Before paying a bill or note the maker or acceptor ought to take care and ascertain that the indorsements are genuine, and that they are sufficient to transfer the title to the person who demands payment. If the indorsements on the note or bill are in blank, it is only necessary to know that the payee's indorsement is genuine; but if there are several successive special indorsements, the party paying ought to be certain that all of these indorsements are genuine, since the holder cannot acquire any title through a forged indorsement. *Graves v. American Exchange Bank*, 17 N. Y. (3 Smith) 205; *Canal Bank v. Bank of Albany*, 1 Hill, 287. Thus, where the payee of a note, drawn

payable to him or order, indorses it specially payable to A, or order, who then indorses it specially payable to B, or order, in such a case the title to the note is in B, and no other person has a legal right to demand payment of it, except as his agent. *Burdick v. Green*, 15 Johns. 247; *Strong v. Stevens*, 4 Duer, 668. But where the payee indorses the instrument in blank, the rule is otherwise, even though there are subsequent special indorsements on the note, because the holder is entitled to deduce his title through the first indorser, and therefore the maker is protected in paying the money to the party who has it in possession, in the same manner as though the note had originally been made payable to the bearer. *Wateroliet Bank v. White*, 1 Denio, 608. The drawee of a bill of exchange is bound to know the handwriting of his correspondent, the drawer, and if he accepts or pays a bill in the hands of a *bona fide* holder for value, he is concluded by the act, although the bill turns out to be a forgery. If he has accepted, he must pay; and if he has paid, he cannot recover the money back. *Goddard v. Merchants' Bank*, 4 Comst. 147; S. C., 2 Sandf. 247; *Graves v. American Exchange Bank*, 17 N. Y. (3 Smith) 205. So, if a bank pays a forged check, or a check which has a genuine signature but which has been fraudulently altered to a larger sum, it cannot charge the drawer with the sum so paid without authority. *Weisser v. Denison*, 10 N. Y. (6 Seld.) 68; *Morgan v. Bank of the State of New York*, 1 Kern. 404; *Hall v. Fuller*, 5 Barn. & Cress. 750.

If a bank check has not been cashed, or if a bill or draft has not been accepted, the check ought not to be paid, nor the draft or bill accepted, where the drawer countermands the authority and gives notice thereof to the bank, or the drawee, before payment or acceptance.

As we have already seen, *ante*, 546, bills and notes to be negotiable must be payable in money, and therefore nothing but a money payment will be a legal tender in discharge of the debt. If, however, a party chooses to receive payment in any other article he may do so. And where the note is payable in goods, as in the case of a chattel note, then the payment may be made according to the terms of the note. See "Chattel Note."

ARTICLE XV.

PROCEEDINGS ON NON-PAYMENT. NOTICE.

Section 1. In general. The holder of a bill or note is bound to present it for payment, and to give the drawer and indorsers due notice of the dishonor if it is not duly paid; and an omission, neglect, or refusal to do so is a discharge of the drawer and indorsers.

The law does not require that the notice shall be given in any particular form or set of words; it will be sufficient if the language employed is such as in express terms or by necessary implication to convey notice to the drawers and indorsers of the identity of the bill or note, and that payment of it on due presentment has been neglected or refused by the maker or acceptor. *Hodges v. Shuler*, 24 Barb. 68; S. C., 22 N. Y. (8 Smith) 114; *Cook v. Litchfield*, 9 id. (5 Seld.) 279; *Cayuga County Bank v. Warden*, 1 Comst. 413; *Cook v. Litchfield*, 2 Bosw. 137; *Davenport v. Gilbert*, 4 id. 532; S. C., again, 6 id. 179. The notice will be valid whether verbal or in writing, although a written notice will almost invariably be preferred. *Butt v. Hoge*, 2 Hilt. 81; *Woodin v. Foster*, 16 Barb. 146; *Cuyler v. Stevens*, 4 Wend. 566. The bill or note dishonored ought to be so described in the notice that the drawer or indorsers may know what instrument is intended; and if the notice correctly gives the date, time of payment, amount, names of maker, and of the payees, and of the indorsement, of a promissory note, this will be sufficient although it does not state the number of the note, and although it appears that there were three or four other notes precisely like it outstanding at the time of giving the notice, and although, also, the number was the only means of precisely identifying the note. *Hodges v. Shuler*, 24 Barb. 68; S. C., 22 N. Y. (8 Smith) 114. If the notice gives the names of the makers and indorsers of a promissory note, with the amount thereof, this is a sufficient description in the absence of evidence showing that there were other notes to which the notice would apply. *Youngs v. Lee*, 18 Barb. 187; S. C., 12 N. Y. (2 Kern.) 551. A statement in such notice that the note had been protested for non-payment is a sufficient notice of a presentment and demand of payment at the time and place of payment. *Ib.* But if the notice of non-payment does not state the name of the maker of the promissory note dishonored, it will not be sufficient to charge the indorser.

Home Insurance Company v. Green, 19 N. Y. (5 Smith) 518. If the notice possesses the usual legal requisites, but it misdescribes the bill or note to which it refers, it is to be determined as a matter of fact, upon the circumstances of the case, whether the indorser or drawer could be misled by such misdescription. *McKnight v. Lewis*, 5 Barb. 681.

And if there is a misdescription in some of the particulars, it may be shown that there was at the time of giving the notice no other note in existence to which the description could apply. *Cayuga County Bank v. Warden*, 1 Comst. 413; S. C., again, 6 N. Y. (2 Seld.) 19. And when the notice, in connection with such evidence, identifies the note with reasonable certainty, it will be sufficient to charge the indorsers. *Ib.* It is not necessary that the notice should state who is the owner of the bill or note, or at whose request it is given. The indorser is bound to pay the true owner or holder, and he can ascertain that fact at the time of paying it.

The statute of 1857, which is quoted, *ante*, 629, allows notice of non-acceptance or non-payment to be served on the drawer or indorser of negotiable paper whenever his residence or place of business, as ascertained on inquiry or when designated on the paper, is in the city or town where the note, draft or check is presented for acceptance or payment, by depositing them in the post-office addressed to him there, with postage prepaid.

This statute of 1857, relative to the protest of notes, only alters the law as to the service of notices of protest, when the indorser resides or has a place of business in a city or town, or when he is reported to reside or have a place of business therein, on diligent inquiry. In such cases, the notice may be by notice in the post-office. - *Randall v. Smith*, 34 Barb. 452. But where there is no evidence of any diligence to find the residence of the indorser, or even of any inquiries upon the subject, this statute does not apply. *Ib.* And where a note was dated in New York, and the plaintiffs were informed that the indorser resided on Long Island, it was held that this was sufficient to put them upon inquiry sufficient to satisfy them that he did not reside in New York. *Ib.*

Before the enactment of the law of 1857, the settled rule was, that when the indorser resided in the same place where the presentment or demand was to be made, the notice to the indorser must be served on him personally, or by leaving it at his residence or place of business. *Eddy v. Jump*, 6 Duer, 492. The

only exception to that rule is, that when the indorser lived in the same city or town in which the demand was to be made, but at some remote point from the place of presentment, between which there was a communication by mail, the notice might have been served by mailing it to him, directed to him at a post-office where he usually received his letters or papers. *Ib.* Where the service of the notice is made by mail, the holder ought to be careful that his letter containing it is properly directed, for if any delay occurs through his neglect or want of care in this respect, it will discharge the party entitled to notice.

The law does not require that notice shall be brought home to the indorser, nor that it shall be directed to his place of residence. It is sufficient if the holder of a bill or note make diligent inquiry for the drawer or indorser, and then acts upon the best information which he is able to obtain. *Libby v. Adams*, 32 Barb. 542; *Beale v. Parish*, 24 id. 243; S. C., 6 E. P. Smith, 408; *Mechanics' Banking Association v. Place*, 4 Duer, 212.

In relation to the time when the notice must be served, the rule is, that the party who is sought to be charged upon the bill or note is entitled to prompt notice of its dishonor by the maker or acceptor. When the parties live in the same town, it is said that notice must be given in time to be received in the course of the next day after the dishonor of the bill or note, or after the party giving the notice had himself received notice of dishonor. There must be due diligence, not that a party is bound to neglect all other business, and, the moment he receives notice, send a notice to those whom he intends to charge. He has a whole day, and so much more as will enable him, by the use of diligence, to communicate the notice to the party sought to be charged. A day is not in all cases the limit. If there are many indorsers, and the notice in fact travels through them all, if there has been no want of diligence between any two of them, whatever time may have been occupied, the notice will be good. The rule is not that each indorser has a day; but the rule is, that *due diligence shall be observed*, in the actual state of circumstances under which the notice is given. *Rowe v. Tipper*, 13 C. B. 249, 256; *Bank of Utica v. Smith*, 18 Johns. 231; *Howard v. Ives*, 1 Hill, 263; *Mead v. Engs*, 5 Cow. 303; *Bank of United States v. Davis*, 2 Hill, 451.

There must be a proper demand of payment and refusal thereof, before notice of dishonor can legally be given, and a notice before that time is a nullity. *Jackson v. Richards*, 2 Caines,

343; *Griffin v. Goff*, 12 Johns. 423. After a bill has in fact been dishonored, a notice of dishonor given by a party to the bill, in terms unequivocally asserting the dishonor, is valid, although the party giving the notice had no certain knowledge of the fact of the dishonor. *Jennings v. Roberts*, 4 Ell. & Bla. 615.

Where a bill of exchange has been presented and dishonored, the holder may either resort to his immediate indorser, giving him due notice of dishonor, or he may resort to any or all of the other indorsers or prior parties intermediate between him and the acceptors, whose names appear upon the bill, giving to each of these parties respectively, notice of dishonor in the same manner as if each were the sole indorser; subject, however, to this qualification, that the holder may avail himself of any notice which has been given in due time by any previous indorser, who, at the time of giving such notice, was under liability to the holder. *Lysaght v. Bryant*, 9 C. B. 46; *Harrison v. Ruscoe*, 15 Mees. & Wels. 231; *Chapman v. Keane*, 3 Ad. & El. 193; *Mead v. Engs*, 5 Cow. 303; *Stafford v. Yates*, 18 Johns. 327. But although notice of non-payment, when given by the holder of a note to an indorser, will inure to the benefit of other parties to the paper, and though an inability to learn the proper place for giving such notice will excuse the holder from giving such notice, yet such excuse will not be available to another indorser who possesses the necessary information. *Beale v. Parrish*, 20 N. Y. (6 Smith) 407. But such ignorance excuses the giving the notice so long only as the cause continues, and whenever the party has the proper information for correctly serving the notice, a duty arises which requires a proper service, and if it is omitted, the holder will be held responsible in the same manner as though negligent in the first instance. *Ib.*

Where a bill or note is indorsed by several indorsers, each of them is liable thereon in the order in which his name stands on the instrument, and any one of the latter indorsers may take up the note at maturity and maintain an action against any one of those who indorsed before he did. *Bradford v. Corey*, 5 Barb. 461; *Leonard v. Barker*, 5 Denio, 220; *Corey v. White*, 3 Barb. 12; *Barker v. Cassidy*, 16 id. 177; *Hays v. Phelps*, 1 Sandf. 64. But a subsequent indorser cannot maintain a joint action against prior indorsers who indorsed severally, if the action is brought against them for the recovery of money paid for them by the plaintiff. *Barker v. Cassidy*, 16 Barb. 177. Nor can the payee and first indorser of a note recover against a second

or subsequent indorser thereof, either in an action upon the note itself, or upon allegation and proof of a verbal agreement which was to render such second or subsequent indorser liable to the first indorser. *Hauck v. Hund*, 1 Bosw. 431 ; *Bradford v. Martin*, 3 Sandf. 647 ; *Lester v. Paine*, 39 Barb. 616. And it has been held that it will not make any difference as to the rule, even where the second indorser puts his name on the note before the first indorser did. *Ib.* But see the cases cited, *ante*, 601.

The holder of a bill or note ought to give notice of its dishonor to all the parties to whom he intends to look for payment ; but it will be sufficient if he gives due notice to his immediate indorser for the purpose of charging him ; and it is the business of each indorser to see that his immediate indorser is properly notified. *Morgan v. Woodsworth*, 3 Johns. Cas. 89 ; *Bank of Utica v. Smith*, 18 Johns. 230 ; *Bank of U. S. v. Davis*, 2 Hill, 451. If the holder is not satisfied with the responsibility of his immediate indorser, his proper course is to give notice to all the parties to whom he intends to look for indemnity on the instrument. If a note is indorsed by a firm, notice to one partner is notice to all of them. *Willis v. Green*, 5 Hill, 232 ; *Bank of Chenango v. Root*, 4 Cow. 126.

CHAPTER XXV.

BILLS OF PEACE.

TITLE I.

NATURE OF THE REMEDY BY, AND IN WHAT CASES ALLOWED.

ARTICLE I.

WHEN THE REMEDY WILL LIE.

Section 1. Nature of the remedy. A bill of peace, technically so called, is an equitable remedy which sometimes bears a close resemblance to a bill in equity *quia timet*. The latter is, however, distinguishable from the former in various respects, as will hereafter be seen, and is usually applied to prevent wrongs or anticipated mischiefs before the actual commencement of a suit; whereas, a bill of peace is usually brought after the right of the complainant has been established at law. It is founded upon the equity, that if the right be established at law, it is entitled to adequate protection. *Bond v. Little*, 10 Ga. 395; *Dedman v. Chiles*, 37 B. Monr. (Ky.) 426; *Gunn v. Harrison*, 7 Ala. 585. The ends sought to be attained by the remedy are, to procure repose from perpetual litigation, and to prevent a multiplicity of suits; and the bill may be filed for securing an established legal title against the vexatious recurrence of litigation, whether by a numerous class insisting on the same right, or by an individual reiterating an unsuccessful claim. See Adams' Eq. 199; *Eldridge v. Hill*, 2 Johns. Ch. 281; *Sheffield Water Works v. Yeomans*, L. R., 2 Ch. App. 8; *Phillips v. Hudson*, id. 242.

§ 2. **To quiet claims established at law.** A very important class of cases to which bills of peace are applicable is, where the plaintiff has, after repeated trials, satisfactorily established his right at law, but is still in danger of being subjected to further litigation and having his right obstructed. Upon filing a bill of peace, under such circumstances, a court of equity will grant a perpetual injunction to quiet the possession of the plaintiff, and to suppress all future litigation of his right. *Trustees of Hunt*

ington v. Nicoll, 3 Johns. 566, 589. Thus, where the title to land had been several times tried in an ejectment suit, and a verdict each time given in favor of the plaintiff, a perpetual injunction was decreed upon the ground that it was the only adequate means of suppressing oppressive litigation and irreparable mischief. *Earl of Bath v. Sherwin*, Prec. Ch. 261; S. C., 10 Mod. 1; 1 Bro. P. C. 266; *Leighton v. Leighton*, 1 P. Wms. 671. There is no positive rule as to the number of verdicts which must precede the bill of peace. If the right of the plaintiff is satisfactorily established, it is held to be immaterial whether the number of trials which have taken place are two only, or more. *Trustees of Huntington v. Nicoll*, 3 Johns. 566, 589; *Marsh v. Reed*, 10 Ohio, 347; see *Craft v. Lathrop*, 2 Wall. Jr. 103. But the institution of repeated suits, if the same are abandoned before trial, can furnish no foundation for the maintenance of a bill of peace to restrain vexatious litigation. *Patterson v. McCamant*, 28 Mo. 210; see *Marmaduke v. Hannibal, etc., R. R. Co.*, 30 id. 545; *Knowles v. Inches*, 12 Cal. 212; *Alexander v. Pendleton*, 8 Cranch, 462.

In Pennsylvania, and perhaps in some of the other States, two verdicts in ejectment, for either party, are, by a statutory provision, made an absolute bar to any future suit. But a provision of this kind does not interfere with the right of a court of the United States to entertain a bill of peace as to ejectment in its own jurisdiction. *Craft v. Lathrop*, 2 Wall. Jr. 103.

§ 3. To establish rights of all parties. Another class of cases in which a bill of peace is the proper remedial process is, where one general legal right is claimed against several distinct persons. And the remedy is applicable where one person claims or defends a right against many, or where many claim or defend a right against one. *Sheffield Water Works v. Yeomans*, L. R., 2 Ch. App. 8; *Alexander v. Pendleton*, 8 Cranch, 462, 468; *Eldridge v. Hill*, 2 Johns. Ch. 281. Courts of equity, upon the sole ground of preventing multiplicity of suits, in such cases, will try a title or have it tried upon proper issues, because there is a number of persons interested in it, and a great many actions at law would be necessary to conclude the title. *Ib.*; *Patterson v. McCamant*, 28 Mo. 210. Suits concerning fisheries, parochial tithes, etc., are of this kind and fall within this class. See *Tenham v. Herbert*, 2 Atk. 483; *Duke of Norfolk v. Meyers*, 4 Mad. 50, 117; *Phillips v. Hudson*, L. R., 2 Ch. App. 242. Thus, where one has possession, and claims a right of fishery for some

distance along the course of a river, and the riparian proprietors set up several adverse rights, the former is entitled to a bill of peace against all of them for the purpose of establishing his right, and quieting his possession. *Mayor of York v. Pilkington*, 1 Atk. 282. So, a bill of peace will lie to establish a right of common of the freehold tenants of a manor. *Cowper v. Clark*, 3 P. Wms. 157; or to settle the amount of a general fine to be paid by all the copy-hold tenants of a manor. *Ib*; *Powell v. Powis*, 1 Younge & Jerv. 159; or to establish a duty, claimed by a municipal corporation against many persons, even where there is no privity between them. *Tenham v. Herbert*, 2 Atk. 483. See *Morgan v. Morgan*, 3 Stew. (Ala.) 383. It has likewise been held, that a ferryman, having an exclusive right of ferriage, may maintain a bill of peace against those infringing his privilege. *McRoberts v. Washburn*, 10 Minn. 23; *Letton v. Goodden*, L. R., 2 Eq. 123.

§ 4. In other analogous cases. The two classes of cases above mentioned are the only ones in which bills of peace, technically such, will lie; that is, where the complainant has satisfactorily established his right at law; or where, from the number of the parties to the controversy, an issue under the direction of the court is indispensable, to embrace them all and save a multiplicity of suits. *Eldridge v. Hill*, 2 Johns. Ch. 281; *Lopeer County v. Hart*, Harring. Ch. (Del.) 157. There are, however, many cases analogous to these, in which courts of equity have interfered to quiet the enjoyment of a right, or to establish it by a decree, on a principle similar to that which governs bills of peace. See *Kennedy v. Kennedy*, 43 Penn. St. 413, 417; *Bean v. Coleman*, 44 N. H. 539. Such, for example, are cases of confusion of boundaries; see *Kender v. Jones*, 17 Ves. 110; and under the prayer for general relief in a bill of peace, a court of equity may require a disputed boundary to be surveyed and marked in a permanent manner. *Primm v. Raboteau*, 56 Mo. 407. So, in cases of mines and collieries, a court of equity will entertain bills in the nature of bills of peace, where there is danger that the mine may be ruined in the meantime before the right can be established; and upon such a bill the court will grant an adequate remedy by quieting the party in the enjoyment of his right, by restoring things to their old condition, and by establishing the right by a decree. See 2 Story's Eq. Juris., § 860; *Alexander v. Pendleton*, 8 Cranch, 462, 468. Bills enjoining the defendant from repeated acts of trespass, closely resemble

bills of peace. *Livingston v. Livingston*, 6 Johns. Ch. 497. Such, for instance, are bills to restrain interference with or obstruction of a water-course. *Lyon v. McLaughlin*, 32 Vt. 423; *Corning v. Troy Iron Factory*, 39 Barb. 311; S.C. affirmed, 40 N. Y. (1 Hand) 191; *Crill v. City of Rome*, 47 How. (N. Y.) 398; *Scheetz's Appeal*, 35 Penn. St. 88; *Sheldon v. Rockwell*, 9 Wis. 166. Other cases will be noticed in treating of Bills *Quia Timet*, Cloud on Title, etc.

ARTICLE II.

WHEN THE REMEDY WILL NOT LIE.

Section 1. To establish private right against the rights of the public. A bill of peace will not lie to establish a party in the enjoyment of a right claimed in contradiction to a public right; as where he claims an exclusive right to a highway, or to a common navigable river. For, it is said, if a bill of peace could be sustained in such a case, the injunction would be against all the people of the State or country. See *Adams' Eq.* 200; *Dilly v. Doig*, 2 Ves. Jr. 486. But the true principle is stated to be, that courts of equity will not, in such cases, upon principles of public policy, intercept the assertion of public rights. 2 *Story's Eq. Juris.*, § 858.

§ 2. **No privity among parties.** To entitle a party to maintain a bill of peace, it is essential that there be a right claimed affecting many persons. There must be a single claim of right in all arising out of some privity or relationship with the plaintiff. Thus the remedy will lie against the lord by one copy-holder, on behalf of himself and the other copy-holders, being numerous, to have their rights of common ascertained; but one copy-holder, not suing on behalf of all, cannot maintain the bill. *Phillips v. Hudson*, L. R., 2 Ch. App. 243; see *Cowper v. Clerk*, 3 P. Wms. 157; *Weller v. Smeaton*, 1 Bro. Ch. 572; *Alexander v. Pendleton*, 8 Cranch, 462, 468. Nor will it lie where the rights and the responsibilities of the defendants neither arise from, nor depend upon, nor are in any way connected with each other. *Randolph v. Kinney*, 3 Rand. (Va.) 394; but see *Mayor of York v. Pilkington*, 1 Atk. 284; *Tenham v. Herbert*, 2 id. 483. In short, when one party only claims, and another denies a right, the court will not entertain the bill. *Weller v. Smeaton*, 1 Bro. Ch. 572.

§ 3. No legal or equitable title in party. Those only who have a clear, legal, and equitable title to land, connected with possession, have a right to claim the interference of a court of equity, to give them peace or dissipate a cloud on the title. *Orton v. Smith*, 18 How. 263; *Thomas v. White*, 2 Ohio St. 540. So a bill in the nature of a bill of peace, and praying for a discovery against joint and several trespassers on real estate, will not lie in favor of a plaintiff out of possession, claiming title to the land. *Ritchie v. Dorland*, 6 Cal. 33; See Cloud on Title.

§ 4. Remedy at law. It is a settled principle that a bill of peace will not lie, where the party has a plain, speedy, and adequate remedy at law. *Ritchie v. Dorland*, 6 Cal. 33. And it is held, that the courts of the United States will not take jurisdiction of a bill of peace for an injunction to quiet the title of an estate, where the title is already in litigation in a court of concurrent jurisdiction. *Orton v. Smith*, 18 How. 263.

CHAPTER XXVI.

BILLS QUIA TIMET.

TITLE I.

OF THE NATURE OF BILLS QUIA TIMET, AND IN WHAT CASES ALLOWED.

ARTICLE I.

WHEN THE REMEDY WILL LIE.

Section 1. Definition and nature of bills quia timet. Bills in equity *quia timet* are so called in analogy to certain writs of the common law, six in number, called *brevia anticipantia*, writs of prevention. See Co. Litt. 100 *a*. These common-law writs are now seldom used ; but a bill in equity *quia timet* is a remedy in common use for the prevention of wrongs and anticipated mischiefs. The party seeks the aid of a court of equity, because he fears (*quia timet*) some future probable injury to his rights or interests, and not because an injury has already occurred, which requires any compensation or other relief. 2 Story's Eq. Juris., § 826. And unless there is danger that the plaintiff will be subjected to loss by the neglect, inadvertence, or culpability of another, the remedy by bill *quia timet* will not lie. *Randolph v. Kinney*, 3 Rand. (Va.) 394 ; *Green v. Hankinson*, Walker (Mich.), 487 ; *Sanderson v. Jones*, 6 Fla. 430 ; see *Tippling v. Eckersley*, 3 K. & J. 264.

§ 2. **To preserve property for the party entitled thereto.** Bills *quia timet*, in their character as a preventive remedy, are usually filed to secure the preservation of property, to its appropriate uses and ends, for the party entitled thereto ; and the jurisdiction of a court of equity to allow the remedy may be exercised wherever there is danger of the property being converted to other purposes, or diminished, or lost through culpable negligence. See *Gibson v. Jayne*, 37 Miss. 164 ; *Collins v. Barksdale*, 23 Ga. 602 ; *Champlain v. Champlain*, 4 Edw. Ch. (N. Y.) 228 ; *Pattison v. Gilford*, L. R., 18 Eq. 259. As it regards equitable property, this jurisdiction attaches equally in cases where there is a

present right of enjoyment, and in cases where the right of enjoyment is future or contingent. 2 Story's Eq. Juris., § 827. In order to render the remedy effectual, the court will take the fund into its own hands, or through the agency of its own officers or otherwise, secure its proper management and appropriation. Thus, it is said to be the settled principle of the court that an executor or other trustee, who mismanages or puts the assets in jeopardy by his insolvency, either existing or impending, should be prevented from further interfering with the estate, and that the funds should be withdrawn from his hands. *Elmendorff v. Lansing*, 4 Johns. Ch. 565. So, in case of collusion between the debtors of the estate and the executors or administrators, the court will order the former to pay the amounts of their debts into court. See *Utterson v. Mair*, 4 Bro. Ch. 277; *Taylor v. Allen*, 2 Atk. 213; *Phipps v. Annesley*, id. 58. In some of the States executors are required to give bonds like administrators, for the faithful administration of the estates of the testators; and where this is the case, any resort to a court of equity for the remedy under consideration is rendered unnecessary. Thus, under the Revised Statutes of New York, if the circumstances of the executor are such as not to afford adequate security for the faithful discharge of his trust, and the objection is made by a person interested in the estate, the surrogate is bound to require security from the executor. 2 R. S. 72, § 18. And see *Shields v. Shields*, 60 Barb. 56; *Wood v. Wood*, 4 Paige's Ch. 299; *Mandeville v. Mandeville*, 8 id. 475.

§ 3. Application of remedy to future interests in personalty. Where the right to the enjoyment of legal property is a present right, legal remedies will be generally found sufficient for its protection and vindication. But it is otherwise where the right of enjoyment is future or contingent. Thus, if personal property be given by will to A for life, and after his death to B, there is, at law, no remedy to secure the legacy to B, whether it be of specific chattels, or of a pecuniary nature. *Clark v. Clark*, 8 Paige, 152; 2 Story's Eq. Juris., § 843. In all cases of this kind, however, courts of equity will now interfere and grant relief upon a bill *quia timet*, where there is any reason to fear the destruction or removal of the property, or injury is apprehended to it, in the hands of the party who is entitled to the present possession. *Collins v. Barksdale*, 23 Ga. 602; *Emmons v. Cairns*, 2 Sandf. Ch. 369; *Gibson v. Jayne*, 37 Miss. 164; *Coenhoven v. Shuler*, 2 Paige, 123; *James v. Scott*, 9 Ala. 579.

Where a binding agreement was made by an uncle, that his nephew should have his property after his death, the nephew was held entitled to relief in the life-time of the uncle, against a conveyance in fraud of the agreement. *Van Duzne v. Vreeland*, 1 Beasl. (N. J.) 142. And where, under marriage articles, the plaintiff, in case she survived her husband, had a contingent interest in certain South Sea annuities, and a certain promissory note, which were specifically appointed for the payment of the same, to be allowed her, and the defendant had threatened to aliene the property and securities, on a bill *quia timet*, a decree was made, that the defendant should give security to have the same forthcoming. *Flight v. Cook*, 2 Ves. Sr. 619; 2 Story's Eq. Juris., § 846. It is likewise held, that if children who are remaindermen under a marriage settlement are in fear that the property is being wasted and squandered, their proper remedy is by a bill *quia timet*. *Sanderson v. Jones*, 6 Fla. 430. So, where a life-interest in personal property is seized in execution as the property of the tenant for life, and sold as such, and the purchaser claims the entire interest, a court of equity will interpose for the protection of the rights of the remaindermen. *McDougal v. Armstrong*, 6 Humph. (Tenn.) 428; *Bowling v. Bowling*, 6 B. Monr. (Ky.) 31. And it seems that a husband who has a contingent interest in property placed in trust for the maintenance of his wife, on his separation from her, is entitled to equitable aid for the protection of the fund, if there is reason to fear that it will be squandered, or diverted from the purpose for which it was provided. *Cranston v. Plumb*, 54 Barb. 59. But equity will not grant an injunction at the suit of the wife, to prevent a husband from disposing of his property, on the ground of apprehended desertion by the husband, and his removal beyond the jurisdiction of the State. *Anshutz v. Anshutz*, 1 Green's Eq. (N. J.) 162.

§ 4. **Protection of sureties.** The remedy by a bill *quia timet* is also applicable in cases of sureties of debtors and others seeking protection. Thus, if a surety, at the time a debt is due, apprehends loss or injury from the delay of the creditor to enforce the debt against the principal debtor, he is entitled to this remedy for the purpose of compelling the debtor to discharge the debt or other obligation for which the surety is held. *Cox v. Tyson*, 1 Turn. & Russ. 395; *Nisbet v. Smith*, 2 Bro. Ch. 579. And it is now considered a settled rule, that the surety may come into equity, if he apprehends danger from the creditor's

delay, and compel the creditor to sue the principal debtor, though, probably, he must indemnify the creditor against the consequences of risk, delay and expense. *Hayes v. Ward*, 4 Johns. Ch. 123, 132; *Stephenson v. Taverners*, 9 Gratt. (Va.) 398; *King v. Baldwin*, 2 Johns. Ch. 561; *Wright v. Simpson*, 6 Ves. 734. But see *Rees v. Berrington*, 2 Ves. Jr. 540; *Nesbit v. Smith*, 2 Bro. Ch. 579.

§ 5. **Miscellaneous cases.** There are various other cases in which a remedy in the nature of bills *quia timet* is applied by a court of equity to prevent the waste or destruction of property *pendente lite*, or to prevent irreparable mischief. See *Building Association v. Ashmead*, 7 Phila. (Penn.) 272. Thus a court of equity has unquestioned jurisdiction, *quia timet*, of a petition to enjoin one from cutting timber, or otherwise intruding on a strip of land claimed by both parties, and seeking reparation for past intrusion and conversion of timber. *Peak v. Hayden*, 3 Bush (Ky.), 125. So, a bill *quia timet* will lie where the defendant is interfering with the complainant's tenants by demanding rent of them, and is throwing suspicion on the complainant's title, and the latter cannot maintain an action at law because he has not been dispossessed. *Polk v. Rose*, 25 Md. 153. Other illustrations of the application of the remedy will be given in treating of Cloud on Title, Matters of Injunction, etc.

In a recent case it was held, that an instrument will not be canceled on a bill *quia timet*, without a clear showing of the complainant's title to such relief, free from all reasonable doubt. *Shotwell v. Shotwell*, 24 N. J. Eq. 378.

ARTICLE II.

MODE OF OBTAINING RELIEF.

Section 1. In general. The mode in which courts of equity afford relief upon a bill *quia timet*, in cases where the plaintiff has established his title to the future enjoyment, or it is admitted, is dependent upon circumstances. Sometimes the relief is given by the appointment of a receiver to receive rents or other income, sometimes by an order to pay a pecuniary fund into court, sometimes by ordering the defendant to give security, and sometimes by the mere issuing of a writ of injunction or other remedial process. See Jeremy's Eq. Juris. 248; Story's Eq. Juris., § 826.

§ 2. **By appointment of receiver.** The appointment of a receiver is, in most cases, one of the objects of a bill *quia timet*. The appointment is made upon principles of justice for the benefit of all parties concerned, and is a matter wholly resting in the sound discretion of the court. *Verplank v. Caines*, 1 Johns. Ch. 57; *Skip v. Harwood*, 3 Atk. 564. The object of the appointment is, to secure the property for its appropriate uses and ends, and to prevent it from being dissipated where there is danger of its being converted to other purposes, or deteriorated, or lost. As regards an equitable property, a receiver may be appointed to secure it from danger, whether the right of enjoyment be present or future, vested or contingent. Thus, where an executor or other trustee is charged with an abuse of his trust, the court will appoint a receiver, or in case the fund be pecuniary, will direct it to be paid into court, or require security for its preservation and appropriation. See *Utterson v. Mair*, 4 Bro. Ch. 277; *Mandeville v. Mandeville*, 8 Paige, 475; *Haggarty v. Pitman*, 1 id. 298; *Chappell v. Akin*, 39 Ga. 177; *In re Johnson*, L. R., 1 Ch. App. 325.

In accordance with the maxim that equality is equity, the appointment of a receiver is made for the benefit and on behalf of all the parties in interest, and not for the benefit of the plaintiff or one defendant only. *Davis v. Duke of Marlborough*, 1 Swanst. 83; S. C., 2 id. 125. Where there are creditors, annuitants, and others, some of whom are creditors at law, claiming under judgments, and others are creditors claiming upon equitable debts, if the property be of such a nature, that if legal, it may be taken in execution, it may, if equitable, be put into the possession of a receiver, to hold the same, and apply the profits under the direction of the court, for the benefit of all the parties, according to their respective rights and priorities. *Id.* 125, 135, 139, 145, 146. The same rule is applicable to cases where the property is legal, and judgment creditors have taken possession of it in any manner; for it is competent for the court to appoint a receiver of any kind of creditors, not disturbing the just prior rights, if any, of the judgment creditors. *Ib.*; S. C., 1 Swanst. 83; *White v. Bishop of Peterborough*, 3 id. 117, 118; 2 Story's Eq. Juris., § 829. Hence the appointment of a receiver, in cases of this sort, is often called an equitable execution. *Ib.* There are statutory provisions existing very generally in the United States, by means of which, aid may be had in a court of equity in favor

of a judgment creditor, and sometimes even before judgment, to secure or apply assets which cannot be reached by ordinary legal process. See *Hastings v. Palmer*, Clarke's Ch. (N.Y.) 52; *Hadden v. Spader*, 20 Johns. 554. This remedy is known as a creditor's bill, and the jurisdiction of a court of equity to grant the relief afforded thereby would seem to exist independent of statutes. See *Barry v. Abbott*, 100 Mass. 396; *Pendleton v. Perkins*, 49 Mo. 565; *Cohen v. Myers*, 42 Ga. 46; *Skinner v. Maxwell*, 66 N. C. 45; *Dumphy v. Kliensmith*, 11 Wall. 610. And see title Creditor's Bill.

The receiver, when appointed, is virtually an officer and representative of the court, and subject to its orders. *Angel v. Smith*, 9 Ves. 335; *Hutchinson v. Massareene*, 2 B. & B. 55; *Skip v. Harwood*, 3 Atk. 564. The appointment of a receiver of the rents and profits of real estate is generally deemed to entitle him to possession of the premises. If there are tenants in possession of the premises, they are compellable to attorn to the receiver, although not parties to the suit. See *Sea Ins. Co. v. Stebbins*, 8 Paige, 565; *Bowery Savings Bank v. Richards*, 3 Hun (N. Y.), 366; S. C., 6 N. Y. S. C. (T. & C.) 59; and the court thus becomes, *pro hac vice*, the landlord. *Angle v. Smith*, 9 Ves. 335; *Sharp v. Carter*, 3 P. Wms. 379; see *Albany City Bank v. Schermerhorn*, 9 Paige, 372. The possession of the receiver does not, however, affect the rights of third persons when they are ultimately established, but he is considered as holding for the true owner; nor can he proceed in any ejectment against the tenants of any estate, without the authority of the court. *Wynne v. Lord Newborough*, 3 Bro. Ch. 88; S. C., 1 Ves. Jr. 164. And generally, he is not at liberty to bring or to defend actions, let the estate, or lay out money, without the special leave of the court. *Merritt v. Lyon*, 16 Wend. 405, 410; *Matter of Bangs*, 15 Barb. 264. See *Armstrong v. Armstrong*, L. R., 12 Eq. 614. Before entering upon the performance of the duties of his appointment, the receiver will be required to give bond with surety under the direction of the court. 2 Madd. Ch. Pr. 240. He is bound to act in good faith and with a proper degree of diligence; and if property is lost through his fault or neglect, he may be held liable for it. See *Knight v. Plymouth*, 3 Atk. 480; *Wren v. Kirton*, 11 Ves. Jr. 377; *Aurentz v. Porter*, 56 Penn. St. 115.

In addition to the cases mentioned generally, in which a receiver will be appointed under a bill *quia timet*, may be added those cases where an estate is held by a party, under a title ob-

tained by fraud, actual or constructive. *Huguenin v. Baseley*, 13 Ves. 105. So, where there are several incumbrances on an estate, and the first incumbrancer is not in possession, and does not desire it, or if he has been paid off, or refuses to receive what is due him, a receiver may be appointed upon the application of a subsequent incumbrancer. *Codrington v. Parker*, 16 Ves. 469; *Norway v. Rowe*, 19 id. 153; and see *Quarrell v. Beckford*, 13 id. 377; *Sollory v. Leaver*, L. R., 9 Eq. 22. And where tenants of particular estates for life, or in tail, neglect to keep down the interest due upon incumbrances upon the estates, a receiver will be appointed by the court to receive the rents and profits, in order to keep down the interest. *Bertie v. Lord Abingdon*, 3 Meriv. 560, 568; *Giffard v. Hart*, 1 Sch. & Lefr. 407, note; see *Phelan v. Boylan*, 25 Wis. 679.

A court of equity will not interfere, upon slight grounds, with the management and administration of assets by executors and administrators. See *Schlecht's Appeal*, 60 Penn. St. 172; *Hitchen v. Birks*, L. R., 10 Eq. 471. Where, therefore, it is sought to have a receiver appointed against an executor or administrator, it is necessary to show that there is some positive loss, or danger of loss, of the funds; as, for instance, from the insolvency, bankruptcy, fraud, or negligence of the executor or administrator. *In re Johnson*, L. R., 1 Ch. App. 325; *Mandeville v. Mandeville*, 8 Paige, 475; *Chappell v. Akin*, 39 Ga. 177. The poverty of the party alone will not constitute a sufficient ground for the appointment of a receiver. *Howard v. Papera*, 1 Mad. 142; *White v. Bishop of Peterborough*, 2 Swanst. 109; *Wood v. Wood*, 4 Paige, 299, 303.

§ 3. By ordering money to be paid into court. Another remedy which is sometimes allowed under a bill *quia timet*, is an order requiring the payment of money into court, and this upon the principle, that he who is entitled to the money is entitled to have it secured. The court will not apply the remedy, unless the plaintiff has an interest in the fund. See *Cruikshanks v. Roberts*, 6 Mad. 104; *Gedge v. Trail*, 1 Russ. & Mylne, 277. But there are cases in which it will be applied, without any ground being laid to show that there has been any abuse or any danger to the fund. *Freeman v. Fairlie*, 3 Meriv. 29; *Rothwell v. Rothwell*, 2 Sim. & Stu. 217; *Clarkson v. De Peyster*, Hopk. Ch. (N. Y.) 274; *Strange v. Harris*, 3 Bro. Ch. 365. Thus, in cases of bills brought by creditors, or legatees, or distributees, against executors or administrators for a settlement of

the estate, if, by his answer, the executor or administrator admits assets in his hands, and the court takes upon itself the settlement of the estate, it will direct the money to be paid into court. *Ib.*; *Yare v. Harrison*, 2 Cox, 377; 2 Story's Eq. Juris., § 839; see *Mandeville v. Mandeville*, 8 Paige, 475. Papers and writings in the hands of executors and administrators may likewise be directed by the court, to be deposited with a master, for the benefit of those interested, unless there are other purposes which require that they should be retained in the hands of the executors or administrators. *Freeman v. Fairlie*, 3 Meriv. 29; *Clark v. Clark*, 8 Paige, 152.

§ 4. By ordering defendant to give security. This remedy, under a bill *quia timet*, is applied in those cases where property is so situated that the party ultimately entitled to it apprehends fear of its loss, unless security is given for its preservation. A familiar illustration is the case of personal property given by a will to one for life, and afterward to another; and formerly, the legatee in remainder was entitled, in all cases, to come into a court of equity, and to have a decree for security from the tenant for life, for the due delivery over of the legacy to the remainderman. 1 Story's Eq. Juris., § 604. But the modern practice in such cases is, only to require an inventory of the articles, specifying that they belong to the first taker, for the particular period only, and afterward to the person in remainder; and security is not required, unless there is danger that the articles may be wasted, or otherwise lost to the remainderman. *Covenhoven v. Shuler*, 2 Paige, 122, 132; *Henderson v. Vaulx*, 10 Yerg. (Tenn.) 30; see *Bowling v. Bowling*, 6 B. Monr. (Ky.) 31; *McDougal v. Armstrong*, 6 Humph. (Tenn.) 428; *Kinnard v. Kinnard*, 5 Watts (Pa.), 109; *Lippincott v. Warder*, 14 Serg. & R. (Penn.) 118; *Smith v. Ostrand*, 3 Hun (N. Y.), 450; S. C., 5 N. Y. S. C. (T. & C.) 664, 667. And see *ante*, 656, art. 1, § 4.

§ 5. By writ of injunction. Upon a proper case being made out in a bill *quia timet*, supported by proof, the court will enforce the performance of its decree upon the party, by the writ of injunction. But an examination of these cases will be more appropriate, in treating of matters of injunction. See *ante*, 657, art. 1, § 5.

CHAPTER XXVII.

BILL TO REMOVE CLOUD ON TITLE.

TITLE I.

NATURE OF THE REMEDY, AND WHEN OBTAINABLE.

ARTICLE I.

WHEN THE REMEDY LIES.

Section 1. What constitutes cloud on title. A cloud upon title is a title, or incumbrance, apparently valid, but in fact invalid. *Bissell v. Kellogg*, 60 Barb. 617, 629. And a remedy lies for the removal of clouds upon title, because they embarrass the owner of the property clouded, and tend to impede his free sale and disposition of it. *Ib.* And see *Lyon v. Hunt*, 11 Ala. 295; *Anderson v. Hooks*, 9 id. 704; *Huntington v. Allen*, 44 Miss. 654; *Sanxay v. Hunger*, 42 Ind. 44; *Hartford v. Chipman*, 21 Conn. 488. The idea of real danger is not necessarily involved in that of a cloud upon title. If the title is obscured, so as to render the right of the real owner less clear, there is a cloud. *Ward v. Dewey*, 16 N. Y. (2 Smith) 519, 531. Nor is it necessary to constitute a cloud, that there should be a title *upon record* apparently valid. It is sufficient if there be a deed, valid upon its face, accompanied with a claim of title based upon facts showing an apparent title under such circumstances as lead to the belief that the deed is likely to work mischief to the real owner of the property. *Scott v. Onderdonk*, 14 N. Y. (4 Kern.) 9; *Allen v. City of Buffalo*, 39 N. Y. (12 Tiff.) 390; *Fonda v. Sage*, 48 N. Y. (3 Sick.) 173; *Marsh v. City of Brooklyn*, 59 N. Y. (14 Sick.) 280; and see *Moore v. Cord*, 14 Wis. 213; *Gamble v. Loop*, 14 id. 465; *Dunklin County v. Clark*, 51 Mo. 60. So, the rule is stated to be, that if a title, against which relief is prayed as a cloud, is of such a character that, if asserted by action, and put in evidence, it would drive the other party to the production of his own title in defense, it constitutes a cloud, which the latter has a right to have removed. *Lick v. Ray*, 43 Cal. 83.

§ 2. **Jurisdiction to remove, in what court.** The removal of clouds upon title, and obstacles in the way of the full enjoyment of property, is an acknowledged head of equity jurisdiction. *Radcliffe v. Rowley*, 4 Edw. Ch. (N. Y.) 646; *Standish v. Dow*, 21 Iowa, 363; *Walker v. Peay*, 22 Ark. 103; *Low v. Staples*, 2 Nev. 209. And the relief afforded by a court of equity seems to be on the principle of a bill *quia timet*, lest the deed or other instrument might be injuriously used against the party, or might throw a cloud or suspicion over his title. See *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Pettit v. Shepherd*, 5 Paige, 501; *Myers v. Hewitt*, 16 Ohio, 449; *Downing v. Wherrin*, 19 N. H. 9, 91; *Glazier v. Bailey*, 47 Miss. 395. Or, the jurisdiction is exercised upon the ground that it is for the interest of both parties, that the precise state of the title to the estate be known if all are acting *bona fide*; and if not, that a merely colorable and pretended claim is a fraud upon the real owner, and as such should be extinguished. 1 Story's Eq. Juris., § 711, *a.*; and see *Hodges v. Griggs*, 21 Vt. 280; *Eldridge v. Smith*, 34 id. 484. So it is settled that a bill in equity may be maintained to prevent a cloud being cast upon real estate, as well as to remove a cloud already created. *Pettit v. Shepherd*, 5 Paige, 493; *Mann v. City of Utica*, 44 How. (N. Y.) 334; *N. Y. & H. R. R. Co. v. Morrisania*, 7 Hun (N. Y.), 652. And a party may come into equity for the cancellation of a deed, which is a cloud upon his title, though he may have a remedy at law. *Hall v. Fisher*, 9 Barb. 17, 24; *Almony v. Hicks*, 3 Head (Tenn.), 39. Great caution will, however, be exercised by the courts to prevent abuse, and in many cases the parties must be left to their remedies at law. *Glazier v. Bailey*, 47 Miss. 395.

§ 3. **Who may maintain the bill.** A court of equity will entertain jurisdiction to remove cloud upon title only where the complainant is in possession, or from other cause, is without adequate legal remedy. *Bunce v. Gallagher*, 5 Blatch. (C. C.) 48; *Sullivan v. Finnegan*, 101 Mass. 447; *Woods v. Monroe*, 17 Mich. 238; *Burton v. Gleason*, 56 Ill. 25; *Clark v. Covenant, etc., Ins. Co.*, 52 Mo. 272. Persons out of possession, who cannot be compelled to defend their rights at law, are entitled to the equitable remedy. *Barrow v. Robbins*, 22 Mo. 42; see *O'Brien v. Creig*, 10 Kan. 202. A mortgagee may maintain the bill. *Polk v. Reynolds*, 31 Md. 106; *Wofford v. Board of Police, etc.*, 44 Miss. 579; and so may several landholders holding from a common source, on the ground of preventing a multiplicity of suits. *Dart*

v. *Orme*, 41 Ga. 376. And where the vendor in possession claims that a deed is only a mortgage, the vendee may maintain the bill. *Rich v. Doane*, 35 Vt. 124; *Shays v. Norton*, 48 Ill. 100. So, it seems that a judgment obtained after the death of the defendant is a cloud, and a bill for its removal may be maintained by the heir at law of the defendant. *Blodget v. Blodget*, 42 How. (N. Y.) 19; see *Foot v. Dillaye*, 65 Barb. 521, 524. It has been held, that the grantor of land in parcels to numerous parties, with warranty, has such an interest as entitles him to avoid by suit a deed to another party which clouds his title. *Ely v. Wilcox*, 26 Wis. 91; *Chamblin v. Schlichter*, 12 Minn. 276. But see *Bissell v. Kellogg*, 60 Barb. 617. And it seems that one whose title rests on the statute of limitations may come into equity to remove the cloud of the record title. *Marston v. Rowe*, 39 Ala. 722; *Arrington v. Liscomb*, 34 Cal. 365; *Moody v. Holcomb*, 26 Tex. 714. As may likewise a judgment creditor, in order that he may be the better enabled to enforce his judgment. See *Stowell v. Haslett*, 5 Lans. (N. Y.) 380. And in Texas, it is held that a suit may be brought to remove a cloud from the title to the homestead of a deceased person, by his widow and heirs, although no administration has been taken out on the estate of the deceased, and the homestead has never been set apart to them. *Sossaman v. Powell*, 21 Tex. 664.

§ 4. In what cases maintainable. Among the cases in which bills to remove clouds upon title have been sustained are the following: Where a cloud rests upon the title of a party to real estate, by reason of an unsatisfied mortgage, or a deed made without authority. *Carter v. Taylor*, 3 Head (Tenn.), 30; see *Clouston v. Shearer*, 99 Mass. 209; or where the cloud is created by a deed alleged to be forged; the only question being whether such deed was forged or not. *Bunce v. Gallagher*, 5 Blatch. (C. C.) 481; see *Sullivan v. Finnegan*, 101 Mass. 447; or where another person has obtained a deed for a party's land, which is against conscience for him to use or enforce. *Shell v. Martin*, 19 Ark. 139; or where a deed has been executed though never delivered. *Brewton v. Smith*, 28 Ga. 442; see *Eckman v. Eckman*, 55 Penn. St. 269; *Pratt v. Pond*, 5 Allen (Mass.), 59; or when there has been a sale and a deed in pursuance of a void levy, and the party claims title under them. *Stout v. Cook*, 37 Ill. 283; see *Anderson v. Talbot*, 1 Heisk. (Tenn.) 407. So, the bill is held to lie in case of an actual or threatened sale of the land to another. *Guy v. Hermance*, 5 Cal. 73; *Burt v. Cassity*, 12 Ala. 734; *Thomp-*

son v. Lynch, 29 Cal. 189; or where a title, otherwise clear, is clouded by a claim which cannot be enforced either at law or in equity. *Holland v. Mayor, etc., of Baltimore*, 11 Md. 186; or where there is a void decree for the sale of real estate. *Johnson v. Johnson*, 30 Ill. 215. So, an agreement for the sale of land, which was not accepted within a reasonable time, but was afterward accepted and filed in the recorder's office, was held to be a cloud on the title, for which a bill to remove would lie. *Larmon v. Jordon*, 56 Ill. 204. And where, after the passing of title, the vendor was declared a lunatic, it was held that this created such a cloud upon title as justified the vendee in coming into equity to have his title established. *Younger v. Skinner*, 14 N. J. Eq. (1 McCart.) 389. A bond for a deed creates a lien on the land, and casts a cloud upon the obligor's title which he is entitled to have removed; and if the obligee be in possession, the obligor is not confined to his action of ejectment, even if this would afford a full and complete remedy. *Dahl v. Pross*, 6 Minn. 89.

The exceptional cases in which a court of equity will interfere against a tax or assessment as a cloud are held to be: *First*, where the proceeding in the subordinate tribunal will necessarily lead to a multiplicity of suits; *Second*, where, otherwise, there will be committed irreparable injury; and *Third*, where the title is by the instrument or proceeding *prima facie* valid, and it is necessary to show some extrinsic fact to establish its invalidity. *Crevier v. Mayor, etc., of New York*, 12 Abb. (N. S.) 340; see *Marsh v. City of Brooklyn*, 59 N. Y. (14 Sick.) 280; *Newell v. Wheeler*, 48 N. Y. (3 Sick.) 486; *Gage v. Billings*, 56 Ill. 268; *Lee v. Ruggles*, 62 id. 427; *Hamilton v. Fond Du Lac*, 25 Wis. 490; *Taylor v. Rountree*, 28 id. 391; *Loud v. Charlestown*, 99 Mass. 208; *Hunnewell v. Charlestown*, 106 id. 350. But in some of the States, relief is given solely upon the ground of the illegality of the tax. See *Scofield v. Lansing*, 17 Mich. 437; *McPike v. Pen*, 51 Mo. 63. In a recent case in New York, it was held, that a party has no such constitutional right to the aid of a court of equity for the purpose of removing the apparent lien of a void assessment upon his lands as that the legislature may not deprive him of that particular remedy. It is only when the pretended lien is sought to be enforced by the taking of his property, that the owner is protected by the constitution. A statute, therefore, depriving the courts of the power to give such relief, and the party the benefit of such remedy, is constitutional and

valid. *Lennon v. Mayor, etc., of New York City*, 55 N. Y. (10 Sick.) 361; see *Astor v. Mayor, etc., of New York*, 7 Jones & Sp. (N. Y.) 120; 62 N. Y. (17 Sick.) 580; *Rae v. Mayor, etc., of New York*, 7 Jones & Sp. 192.

ARTICLE II.

WHEN THE REMEDY WILL NOT LIE.

Section 1. Where party is out of possession. As a general rule, a party out of possession has no right to resort to equity to remove a cloud upon title. *Apperson v. Ford*, 23 Ark. 746; *Herrington v. Williams*, 31 Tex. 448; *Polk v. Pendleton*, 31 Md. 118; *Haythorn v. Margerem*, 7 N. J. Eq. (3 Halst.) 324; *Lake Bigler Road Co. v. Bedford*, 3 Nev. 399; *Burton v. Gleason*, 56 Ill. 25; *Clark v. Covenant, etc., Ins. Co.*, 52 Mo. 272; see *Barron v. Robbins*, 22 Mich. 42; *Thompson v. Lynch*, 29 Cal. 189; *Branch v. Mitchell*, 24 Ark. 431; *Almony v. Hicks*, 3 Head (Tenn.), 39; *Low v. Staples*, 2 Nev. 209; *O'Brien v. Creig*, 10 Kans. 202; *Taylor v. Rountree*, 28 Wis. 391. Nor has an executor or administrator any right to file a bill in equity, for the purpose of removing a cloud from the real estate of a decedent; at least, not until a license to sell has been obtained. *Paine v. First Div., etc., R. R. Co.*, 14 Minn. 65; *Gridley v. Watson*, 53 Ill. 186; *Shoemate v. Lockridge*, 53 id. 503.

§ 2. Complainant's title doubtful. Where the complainant himself has no title, or a doubtful title, a court of equity will not afford him relief. *Ross v. Young*, 5 Sneed (Tenn.), 627; *Huntington v. Allen*, 44 Miss. 654; *West v. Schnebley*, 54 Ill. 523. Nor will equity grant relief where there is a doubt as to the legal construction of a deed. *Brown v. Austen*, 35 Barb. 341, 364; S. C., 22 How. (N. Y.) 394.

§ 3. Instrument void on its face. If the instrument claimed to constitute the cloud is void upon its face, a court of equity will not interfere to remove it, because such an instrument can work no mischief. *Crooke v. Andrews*, 40 N. Y. (1 Hand) 547; *Weller v. St. Paul*, 5 Minn. 95; *Head v. James*, 13 Wis. 641; *Meloy v. Dougherty*, 16 id. 269; *Cohen v. Sharp*, 44 Cal. 29; *Hartford v. Chipman*, 21 Conn. 488; and the same is true, although the invalidity does not appear upon the face of the instrument, if it necessarily appears in some one of the links of title which the claimant would have to establish in order to give the instrument force and effect. *Fonda v. Sage*, 48 N. Y. (3

Sick.) 173; affirming S. C., 46 Barb. 109; but see *Almony v. Hicks*, 3 Head (Tenn.), 39. Thus, a father died seized of real estate, leaving two children, his heirs at law, who became tenants in common of the real estate. One of them executed a mortgage upon the whole real estate, and it was held that this did not create a cloud upon the title of the co-tenant which a court of equity would remove, for the reason that a claimant under the mortgage title would have to prove the seizin of the father and the descent to the two heirs, and it would thus necessarily appear that the mortgage was only a lien upon an undivided half of the real estate. *Ward v. Dewey*, 16 N. Y. (2 Smith) 519. In further illustration of the rule, see *Marsh v. City of Brooklyn*, 59 N. Y. (14 Sick.) 280; *Scott v. Onderdonk*, 14 N. Y. (4 Kern.) 9; *Wood v. Seely*, 32 N. Y. (5 Tiff.) 105; *Camp v. Elston*, 48 Ala. 81; *Cohen v. Sharp*, 44 Cal. 29; *Shepardson v. Milwaukee county*, 28 Wis. 593. In *Almony v. Hicks*, 3 Head (Tenn.), 39, it was held, that the jurisdiction of a court of equity to remove cloud upon title will be exercised whether the character of the deed or other instrument complained of appears upon its face or otherwise; and although the defendants are in possession, and complainants have the legal title, and might sue at law for the recovery of the land, that not being esteemed adequate relief. See also *Thompson v. Lynch*, 29 Cal. 189; *Branch v. Mitchell*, 24 Ark. 431; *Carlisle v. Tindall*, 49 Miss. 229; *Anderson v. Talbot*, 1 Heisk. (Tenn.) 407; *Mullins v. Akin*, 2 id. 535.

§ 4. **Other cases.** It has been said, "that can never be considered a legal cloud which cannot for a moment obstruct the unaided rays of legal science where they are brought to bear upon the supposed obscurity." *Van Doren v. The Mayor, etc., of New York*, 9 Paige, 388. A bill to remove cloud upon title will not, therefore, lie, where it is apparent from an inspection of a deed or writing, that no danger to the title or interest of the complainant is to be apprehended. *Cox v. Clift*, 2 N. Y. (2 Comst.) 118; *Farnham v. Campbell*, 34 N. Y. (7 Tiff.) 480; *Tarrent v. Booming Co.*, 22 Mich. 354. And no relief will be granted where an act *en pais* is complained of as a cloud on title, where the act does not itself, and without concurring facts and circumstances, proved *aliunde*, establish any interest in, or title to, the premises. Thus, an attachment against the property of a husband, and a levy thereunder upon the wife's real estate, and the filing of a notice of *lis pendens* constitute *prima facie*

no real or apparent incumbrance or hindrance to or upon the wife's title, and a court of equity will not interfere, at the wife's suit, to discharge the attachment levy and vacate the notice of *lis pendens* as a cloud upon her title. *Mulligan v. Baring*, 3 Daly (N. Y.), 75.

A claim by a vendor, to collect unpaid purchase-money from lands sold and conveyed, does not constitute a cloud on the title of a judgment creditor of the purchaser, who has obtained a decree that the purchaser holds his interest in the lands as trustee for the satisfaction of his indebtedness to such creditor. *Bennett v. Hotchkiss*, 17 Minn. 89. And where the complainants in a bill sought to have certain conveyances set aside, and they claimed as purchasers at a sale under execution, and it appeared that when judgment was rendered the judgment debtor had no title, either legal or equitable, in the land, the bill was dismissed. *McDowell v. Shields*, 12 Mo. 441.

The cases, generally, in which courts of equity have refused their interference to remove clouds upon title are, where such interference was unnecessary, vexatious and expensive, because the instrument or other proceeding in question was void on its face, or had already been adjudged void. *Hartford v. Chipmen*, 21 Conn. 488; see *Hotchkiss v. Elting*, 36 Barb. 38; *Butler v. Viele*, 44 id. 166; *Kay v. Scates*, 37 Penn. St. 31. Gross inadequacy of price is such a badge of fraud that, although it will not, *per se*, authorize a court of equity to declare the title to land void, it will justify such court in refusing to aid in removing clouds upon the title. *Huntington v. Allen*, 44 Miss. 654. And a bill which states only a pretended title in the respondent, and prays for relief against it on the ground of an apprehended injury, cannot be maintained. *Torrent v. Booming Co.*, 22 Mich. 354.

ARTICLE III.

MODE OF GRANTING RELIEF.

Section 1. In general. It is impossible to lay down rules which will cover all the cases in which a court of equity will interpose its jurisdiction to remove a cloud upon title. This jurisdiction does not rest upon any arbitrary rules, but depends upon the facts of each case; and whether it shall be exercised or not, is generally in the discretion of the equity court. Great caution will be exercised by the courts to prevent abuse, and in many cases the parties must be left to their remedies at law. See

Fonda v. Sage, 48 N. Y. (3 Sick.) 173; *Glazier v. Bailey*, 47 Miss. 395. Relief is afforded upon the principle, *quia timet*; and it is now fully established that, in granting such relief, a court of equity has jurisdiction to set aside deeds and other legal instruments, which are a cloud upon title, and to order them to be delivered up and canceled. *Hamilton v. Cummins*, 1 Johns. Ch. 517; *Leigh v. Everhart & Ex'rs*, 4 T. B. Monr. (Ky.) 380; *Apthorp v. Comstock*, 2 Paige, 482; *Petit v. Shepherd*, 5 id. 493; *Burt v. Cassety*, 12 Ala. 734; *Hall v. Fisher*, 9 Barb. 17; *Kimberly v. Fox*, 27 Conn. 307; *Tucker v. Kenniston*, 47 N. H. 267, 270. It is likewise settled by authority, that upon the same principle that the court will remove a cloud already existing upon the owner's title, it will interfere by injunction to prevent a conveyance or other proceeding that would create such a cloud. *Petit v. Shepherd*, 5 Paige, 493; *Mann v. City of Utica*, 44 How. (N. Y.) 334. Thus, where a municipal corporation sold lands for non-payment of an alleged assessment, which in fact was not made, it was enjoined from making a conveyance, which, by statute, would be *prima facie* evidence of all the facts recited, and the certificate of such sale was decreed to be canceled. *Scott v. Onderdonk*, 14 N. Y. (4 Kern.) 9. So, where land was sold on execution against one who held it as trustee for a married woman, and a certificate given to the purchaser by the sheriff, it was held that this was a cloud upon the title, which she might remove by suit in equity before the time of redemption had expired. *Lounsbury v. Purdy*, 18 N. Y. (4 Smith) 515. So it is held that a tax certificate resting on an illegal tax is a cloud which equity will remove, and restrain the completion of the sale. *Dean v. Madison*, 9 Wis. 402; see *Knowlton v. Supervisors, etc.*, id. 410; *Laplaine v. Madison*, id. 409. And where the sheriff was about to sell the plaintiff's homestead illegally, the court interfered by its decree to prevent the sale, holding that it was the same in principle as removing a cloud already created. *Shattuck v. Carson*, 2 Cal. 588; see *Guy v. Hermance*, 5 id. 73; *Bent v. Cassidy*, 12 Ala. 36; *Norton v. Beaver*, 5 Ohio, 178. In general, an execution sale may be enjoined, where it would cause a cloud on the title of the complainant. *Key, etc. v. Munsell*, 19 Iowa, 305; *Bell v. Greenwood*, 21 Ark. 249; *Pixley v. Huggins*, 15 Cal. 127. Though in *Drake v. Jones*, 27 Mo. 428, it is held, that where a sheriff's sale would not pass any title to the purchaser, such sale will not be enjoined, on the ground merely that it might cast a cloud on the title.

CHAPTER XXVIII.

BONDS.

TITLE I.

OF BONDS IN GENERAL.

ARTICLE I.

NATURE AND DEFINITION.

Section 1. In general. An obligation or bond is an instrument in writing and under seal, whereby the obligor declares himself, and usually his heirs, executors and administrators, bound to pay a certain sum of money to another at a day named. If this be all, the bond is called a single one, *simplex obligatio*. But there is generally a condition added, that, if the obligor does some particular act, the obligation shall be void, or else shall remain in full force; as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money borrowed of the obligee, with interest, which principal sum is usually one-half of the *penal* sum specified in the bond. See 2 Broom & Had. Com. (Wait's Ed. Notes) 767; *Wood v. Willis*, 110 Mass. 454; *Hargroves v. Cooke*, 15 Ga. 321; *State v. Thomson*, 49 Mo. 188; *Denton v. Adams*, 6 Vt. 40; *Gilbert v. Anthony*, 1 Yerg. (Tenn.) 69; *Harman v. Harman*, 1 Baldw. 129. This security is also called a *specialty*; the debt being therein particularly specified in writing. *Taylor v. Glazer*, 2 Serg. & R. 502. And the party's seal, acknowledging the debt or duty, and confirming the contract renders it a security of a higher nature than those entered into without the solemnity of a seal. Bac. Abr., Obligations, A.

A bond for money, to be void upon the doing of a certain thing, is, in legal effect, a contract to do that thing. *Waynick v. Richmond*, 11 Kan. 488.

If the obligor in a bond *binds himself*, without adding his *heirs, executors and administrators*, the executors and administrators are bound, but not the heir; for the law will not imply the obligation upon the heir. Sheppard's Touchst. 369; Coke Litt. 209, a.

ARTICLE II.

PARTIES.

Section 1. Obligor. All persons who have the capacity to contract, and whom the law regards as having sufficient freedom for that purpose, may bind themselves in bonds and obligations. But, if a person is illegally restrained of his liberty and during such restraint enters into a bond to the person who causes the restraint, the obligation may be avoided for duress of imprisonment. *Thompson v. Lockwood*, 15 Johns. 256, 259; *Governor v. Williams*, Dudley (Ga.), 424; *Eddy v. Herrin*, 17 Me. 338. And a bond executed through fear of unlawful imprisonment may be avoided on account of duress. *Whitefield v. Longfellow*, 13 id. 146. So, under some circumstances, a bond may be avoided by duress of goods. *Collins v. Westbury*, 2 Bay (S. C.), 211; *Sasportas v. Jennings*, 1 id. 470; *Spaids v. Barrett*, 57 Ill. 289; S. C., 11 Am. R. 10; see *Skeate v. Beale*, 11 Ad. & El. 983; *Atlee v. Backhouse*, 3 Mees. & W. 650; *Nelson v. Suddarth*, 1 Hen. & Munf. (Va.) 350; *Foshay v. Ferguson*, 5 Hill (N. Y.), 158. It is a rule of the common law, that a married woman cannot, during her coverture, make an obligatory contract (*Lewis v. Lee*, 3 B. & C. 291; *Marshall v. Rutton*, 8 T. R. 545); and her bond is *ipso facto* void, and shall neither bind her nor her husband. Bac. Abr., Obligations, D.; see *Concord Bank v. Bellis*, 10 Cush. (Mass.) 276. So, the bond of an infant is void at law, though he fraudulently represents himself to be of age at the time. *Colcock v. Ferguson*, 3 Desau. (S. C.) 482; *Conroe v. Birdsall*, 1 Johns. Cas. (N. Y.) 127. And although he confirms it after he is twenty-one, still it is invalid unless the confirmation be of as high authority as the bond itself. *Baylis v. Dineley*, 3 Maule & Selw. 477. Likewise, if a person *non compos mentis* enters into a bond, it is void. *Yates v. Boen*, 2 Stra. 1104; *Lang v. Whidden*, 2 N. H. 435; *Rice v. Peet*, 15 Johns. 503; *Emery v. Hoyt*, 46 Ill. 258. And a bond may be avoided by reason of excessive drunkenness at the time of executing it. *Cole v. Robins*, Bull. N. P. 172; *Gore v. Gibson*, 13 M. & W. 625. And see *Cummings v. Henry*, 10 Ind. 109; *Caulkins v. Fry*, 35 Conn. 170; *Wilson v. Bigger*, 7 Watts & Serg. (Penn.) 111. But if, on becoming sober, the party intoxicated retain what he received in consideration, he will be held to have confirmed it. *Williams v. Inabnet*, 1 Bailey (S. C.), 343; *Guy v. McLean*, 1 Dev. (N.

C.) 47; *Seymour v. Delancy*, 3 Cow. 445; *Matthews v. Baxter*, L. R., 8 Ex. 132; *Joest v. Williams*, 42 Ind. 565. And if an infant, *feme covert*, etc., who are disabled by law to bind themselves in bonds, enter together with a stranger, who is under none of these disabilities, into an obligation, the stranger is bound, though it be void as to the infant, etc. Bac. Abr., Obligations, D. So, a joint obligor on a bond cannot take advantage of the fact that his co-obligor executed the bond while under duress. *Spaulding v. Crawford*, 27 Tex. 155.

§ 2. **Obligee.** Infants, idiots, as also a *feme covert*, may be obligees. An alien may likewise be an obligee; for since he is allowed to trade and traffic with us, it is but reasonable to give him all that security which is necessary in his contracts, and which will the better enable him to carry on his commerce and dealings among us. Co. Litt. 129 b.; *Wells v. Williams*, 1 Ld. Raym. 282. But at common law a *feme covert* can neither be obligor or obligee to her husband, nor *vice versa*, being but one person in law. Bac. Abr., Obligations, D.; and a person cannot be bound to himself (*Smith v. Lusher*, 5 Cow. 688, 709), even in connection with others. *Ib.*; *Davis v. Somerville*, 4 Dev. (N. C.) 382. But, it has been held, that a bond given by the husband to the intended wife prior to marriage, conditioned for payment of money to her after the obligor's death, is not extinguished by the coverture; and that such a bond may be enforced at law against the heirs of the husband. *Cage v. Acton*, 1 Ld. Raym. 515; *Milbourn v. Ewart*, 5 Term R. 381.

ARTICLE III.

FORM AND CONTENTS OF BOND.

Section 1. In general. At common law, a bond is a deed signed, sealed, and delivered. It is first to be written, by which it is exempted from that uncertainty arising from the imperfection of memory to which unwritten contracts must always be exposed. It is then to be sealed by the party to be bound, and lastly, to be delivered by him, which is the consummation of his resolution. *Gilbert v. Anthony*, 1 Yerg. (Tenn.) 69.

But the law does not require any precise form of words as essentially necessary to create a bond or obligation. Any memorandum in writing under seal, acknowledging a debt, or denoting the intention of the party to bind himself for the payment of a sum of money, will oblige him as effectually as the most formal

words, provided the writing be sealed and delivered. Such, for example, are the following: "I, A. B., have borrowed 10*l.* of C. D.," or "Memorandum that A. owes B. 10*l.*," or "I have agreed to pay J. S. 19*l.*" See *Sawyer v. Mawgridge*, 11 Mod. 218; *Watson v. Snaed*, Vent. 238; *Bedow's Case*, 1 Leon. 25. But, a writing purporting to be an obligation for the payment of money, without naming a person as obligee, is not a bond. *Pelham v. Grigg*, 4 Ark. 141; *Phelps v. Call*, 7 Ired. L. (N. C.) 262. The date of a bond is not essential. It will be valid though there is no date, or the date is erroneous. *Pierce v. Richardson*, 37 N. H. 306; *Fournier v. Cyr*, 64 Me. 32.

§ 2. **Consideration.** Every bond, from the solemnity of the instrument, carries with it an internal evidence of a good consideration, and is to be supported in a court of law, except facts are disclosed to the court whereby the consideration appears to be immoral, illegal, or against the policy of the law. *Page v. Trufant*, 2 Mass. 159; *Dorr v. Munsell*, 13 Johns. 430; *Holdridge v. Allin*, 2 Root (Conn.), 139; *Coyle v. Fowler*, 3 J. J. Marsh. (Ky.) 473; *Harrell v. Watson*, 63 N. C. 454; *Parker v. Flora*, id. 474; *Harris v. Harris*, 23 Gratt. (Va.) 737. No consideration need pass directly between the obligee in a bond and the surety. The consideration which supports the principal's contract will support that of the surety. Notwithstanding the promise of the surety may appear to be founded on a past or executed consideration, he may, nevertheless, be liable; for the consideration may have moved at the instance or request of the surety. And if so, the promise is not a naked one, but is coupled with the precedent request, and the subsequent undertaking will be valid and binding upon him; and such request may be inferred from the circumstances and the nature of the transaction. *Robertson v. Finley*, 31 Mo. 384.

An illegal consideration vitiates a bond no less than a parol agreement. *Trustees v. Gallatin*, 4 Cow. 340; *Morton v. Fletcher*, 2 A. K. Marsh. (Ky.) 138; among the instances of which, are the following: Bonds given for money won at play. *Davidson v. Givins*, 2 Bibb (Ky.), 200; or for the price of tickets in a lottery not authorized by law. *Morton v. Fletcher*, 2 A. K. Marsh. (Ky.) 138; a bond given to indemnify an officer for not returning an execution. *Greenwood v. Colcock*, 2 Bay (S. C.), 67; or to induce him to perform a duty required of him by law. *Mitchell v. Vance*, 5 T. B. Mon. (Ky.) 529; or to indemnify him for permitting an escape. *Lowery v. Barney*, 2 D. Chip. (Vt.) 11; a bond

given to an officer in consideration of an act that he has no legal authority to do. *Moore v. Allen*, 3 J. J. Marsh. (Ky.) 621; or, a bond for money engaged to be given for the sale of an office concerning the administration of justice. *Davis v. Hull*, 1 Litt. (Ky.) 9; *Lewis v. Knox*, 2 Bibb (Ky.), 453. So, a bond given to suppress a prosecution for malicious mischief is void. *Cameron v. McFarland*, 2 Car. Law Repos. 415; as is likewise a bond given in consideration of the obligee's withdrawing opposition to an insolvent debtor's discharge. *Tuxbury v. Miller*, 19 Johns. 311; *Goodwin v. Blake*, 3 Monr. (Ky.) 106; but see *Price v. Summers*, 5 N. J. L. (2 South.) 578. A bond given on an immoral consideration, as, if it be given by a man to a woman as a premium *pudicitiae*, in consideration of future cohabitation, is void. *Troninger v. McBurney*, 5 Cow. 253; *Lady Cox's Case*, 3 P. Wms. 339; *Walker v. Perkins*, Burr. 1568; *Walker v. Gregory*, 36 Ala. 180; *Singleton v. Bramer*, Harper (S. C.), 201. Though it is otherwise if the bond be given in consideration of *past* cohabitation. *Ib.*; and see *Howell v. Fountain*, 3 Ga. 176; *Winnebinner v. Weisiger*, 3 T. B. Monr. (Ky.) 35; *Bunn v. Winthrop*, 1 Johns. Ch. 329; notwithstanding the obligor be a married man during the whole period of cohabitation. *Nye v. Mosely*, 6 Barn. & C. 133; *Lady Cox's Case*, 3 P. Wms. 339. Bonds in restraint of trade are void; as for example, a bond conditioned that the obligor shall never carry on, or be concerned in, the business of founding iron. *Alger v. Thacher*, 19 Pick. (Mass.) 51; or a covenant by the vendor of marl land, that neither he nor his assigns will sell marl from the adjoining land. *Brewer v. Marshall*, 19 N. J. Eq. 537. But it is otherwise, if the condition be only not to trade within certain reasonable limits. See *McClurg's Appeal*, 58 Penn. St. 51; *Nobles v. Bates*, 7 Cow. 307; *Reese v. Hendricks*, 1 Leg. Gaz. Rep. (Penn.) 79. Thus, a bond not to engage in the business of iron casting within sixty miles of Calais, said area containing but few places of much business, was held valid. *Whitney v. Slayton*, 40 Me. 224. So, the rule that bonds in restraint of trade are void would not seem to apply at a time when it was the policy of the law to impose restrictions upon commerce, and consequently, that an embargo bond, made while the embargo laws were in force, would be binding as a common-law bond. *Dixon v. United States*, 1 Brock. 177.

§ 3. Seal. There cannot be at common law a bond without a seal. See *Denton v. Adams*, 6 Vt. 40; *Cantey v. Duren*, Harp.

(S. C.) 434; *State v. Thompson*, 49 Mo. 188; *Pease v. Lawson*, 33 id. 35; *Turner v. Field*, 44 id. 382. And it is held, that the common law intended, by a seal, an impression upon wax or wafer, or some other tenacious substance capable of being impressed. *Warren v. Lynch*, 5 Johns. 239; *Coit v. Millikin*, 1 Denio, 376. In New Hampshire a distinct impression of the seal upon paper is held to be a sufficient seal, without wax or wafer. 9 N. H. 558; *Allen v. Sullivan R. R.*, 32 id. 446. In Maryland, a scroll has been considered a seal from the earliest period of its judicial history. *Trasher v. Everhart*, 3 Gill & Johns. 234, 246. And in many of the other States, the common-law seal has become well nigh obsolete, the statutory "scrawl, by way of seal," having almost entirely superseded it. Among such States may be mentioned New Jersey, Delaware, Virginia, Ohio, Pennsylvania, Kentucky, Indiana, Georgia, Illinois and Missouri. See *Jones v. Longwood*, 1 Wash. (Va.) 42; *Force v. Craig*, 2 Halst. (N. J.) 272; *Alexander v. Jameson*, 5 Binn. (Penn.) 238; *Relph v. Gist*, 4 M'Cord (S. C.), 267; *Vanblaricum v. Yeo*, 2 Blackf. (Ind.) 322; *Harden v. Webster*, 29 Ga. 427; *Pease v. Lawson*, 33 Mo. 35. But the fact that a writing contains the words, "sealed with my seal," etc., when there is no seal or scroll attached, will not make it a bond or sealed instrument. *Chilton v. People*, 66 Ill. 501. It is provided by statute in Michigan, that no bond shall be deemed invalid for want of a seal. Mich. Comp. Laws, § 4550. And this provision gives an unsealed instrument all the force and effect that a sealed one of the same tenor would have. *McKinney v. Miller*, 19 Mich. 142. So in Connecticut, by statute, in 1838, bonds executed without seal are declared to be valid, as though the same had been sealed. *Fish v. Brown*, 17 Conn. 343. And under a statutory act in Tennessee, abolishing private seals, a bond is a deed signed and delivered. Act of 1850, ch. 20, § 1; Code, 1804. And see *Bancroft v. Stanton*, 7 Ala. 351. The word "seal," printed between brackets, on an attachment bond, and adopted by the parties as their seal or scroll, was held a sufficient sealing of the instrument in Missouri. *Underwood v. Dollins*, 47 Mo. 259. And a bond without a seal has been held good by the Supreme Court of the United States. *United States v. Linn*, 15 Pet. 290, 315.

Several obligors may adopt one seal or scroll. *Hollis v. Pond*, 7 Humph. (Tenn.) 222. And a bond signed by "A," (l. s.) "for B, C and D." is sufficiently executed as the bond of B, C and D, by their agent, although only one seal is used. *Martin*

v. Dortch, 1 Stew. (Ala.) 479. So, where a bond containing the usual allegation, "sealed with our seals," has been signed and sealed by one or more obligors, and an additional obligor subsequently signs, and delivers the same as his bond, without affixing a new seal, it is evidence that he adopts a seal already affixed. *Pequarokett v. Mathes*, 7 N. H. 230. A bond signed in the name of the firm, with one seal only, is the bond of the partner alone, who signed it. *Button v. Hampson*, Wright (Ohio), 93; *Russell v. Annable*, 109 Mass. 72.

A party who signs and seals a bond will be bound by it, although his name be not mentioned in the body of the instrument. *Smith v. Crooker*, 5 Mass. 538; *Fournier v. Cyr*, 64 Me. 35; *Blakey v. Blakey*, 2 Dana (Ky.), 463; *Martin v. Dortch*, 1 Stew. (Ala.) 479. And where an obligor signs his name and affixes his seal in the space between the penal part of the bond and the condition thereof, the condition is as much a part of the instrument as if the signature was at the foot of it. *Reed v. Drake*, 7 Wend. 345; *Fournier v. Cyr*, 64 Me. 35; and see *Richardson v. Boynton*, 12 Allen (Mass.), 138.

An instrument of writing in the form of a note, purporting to have been made by a corporation, with the seal of the corporation attached thereto, is a sealed instrument, and must be declared on as such. *Benoist v. Carondelet*, 8 Mo. 250.

ARTICLE IV.

EXECUTION, MODE OF.

Section 1. Attestations, etc. A bond may be executed by an attorney thereto lawfully authorized. *M' Candlish v. Hopkins*, 6 Call (Va.), 208. But such authority must be under seal. *Delius v. Carwithorne*, 2 Dev. L. (N. C.) 90; *McNutt v. McMahon*, 1 Head (Tenn.), 98. And it is only by a writing under seal, that a principal can ratify a bond executed by an agent without competent authority. *Ingraham v. Edwards*, 64 Ill. 526. A power of attorney to execute a bond will be presumed to have been executed on the day of its own date, if nothing is made to appear to the contrary. *Mager v. Hutchinson*, 7 Ill. (2 Gilm.) 265. It is not necessary to the execution of a bond, that the party should himself write his name and affix his seal thereto. If, on the instrument being shown to him, his name and seal having been put to it by another, he acknowledges it to be his act and deed, or uses words equivalent to such acknowledgment, the jury may

find it to be his deed. *Hill v. Scales*, 7 Yerg. (Tenn.) 410; *Rhode v. Louthain*, 8 Blackf. (Ind.) 413. So, acknowledging his signature, on being inquired of, without intimating that he did not consider himself bound, is sufficient to bind the party so signing and sealing. *Byers v. McClanahan*, 6 Gill. & J. (Md.) 250. Nor is it necessary that a witness to the signature sees a party sign his name. It is enough if the obligor acknowledges it to be his signature, and requests the witness to sign. *Pequaw-kett v. Mathes*, 7 N. H. 230.

There can be no objection to the manner or form in which an obligor makes his signature to a sealed instrument, provided it appears that he made it for the purpose of binding himself. *Hinsaman v. Hinsaman*, 7 Jones' L. (N. C.) 510. Thus the fact that a man seals and delivers a bond as his, in which he is named as surety, and that he does this with the intent to become a party to it, is amply sufficient to justify a verdict that it is his bond, though his name is placed upon it in the proper place for the name of a witness. *Richardson v. Boynton*, 12 Allen (Mass.), 138. See also *Argenbright v. Campbell*, 3 Hen. & M. (Va.) 144.

But if a bond is not read to the party executing it, and he cannot read, and the contents are misrepresented, it will not bind him. *Green v. North Buffalo Township*, 56 Penn. St. 110. So, where an illiterate man was induced to sign a bond by the fraudulent representation that it was a petition, he was held not liable thereon although the obligee was not aware of the fraud. *Schuyl-kill county v. Copley*, 67 Penn. St. 386; S. C., 5 Am. R. 441. And a bond, executed when the obligor is so drunk as to be incapable of contracting, may be avoided. *Williams v. Inabet*, 1 Bailey (S. C.), 343. See *ante*, art. 2, § 1.

A bond purporting to be the joint obligation of a principal and sureties, but signed by the latter only, is bad. *Cutler v. Whittemore*, 10 Mass. 442; *Adams v. Bean*, 12 id. 139; *Wood v. Washburn*, 2 Pick. (Mass.), 24; for the reason that it is presumed that each undertook to become liable only if the others did. *Sacramento v. Dunlap*, 14 Cal. 421; see *Sharp v. United States*, 4 Watts (Penn.), 21; *Haskins v. Lombard*, 16 Me. 140; *Dair v. United States*, 16 Wall. 1; *Johnson v. Weatherwax*, 9 Kan. 75; *Loew v. Stocker*, 68 Penn. St. 226. But where two persons execute a bond, one as principal and the other as surety, they are equally bound to the obligee. *Wilson v. Campbell*, 2 Ill. (1 Scam.) 493; and a bond which is drawn up in proper form to be

signed by a principal and a surety, is well executed, if it is first signed by the surety, and afterward in his absence, but before its delivery, is signed by the principal. *Rundell v. La Fleur*, 6 Allen (Mass.), 480. The obligor of a bond cannot avoid his liability by showing that he was induced to execute the bond by the fraud of one of his co-obligors, in which the obligee did not participate. *Bigelow v. Comegys*, 5 Ohio St. 256; see *Spaulding v. Crawford*, 27 Tex. 155. But, if a bond is executed jointly and severally by three, and an alteration is made in it by consent of two, in the absence of the third, and the obligee afterward erase the signature and seal of the third without the consent of the others, the bond is void. *Love v. Shoape*, Walk. 508; *Dewey v. Bradbury*, 1 Tyler (Vt.), 186.

Where the name of a party appears in the body of a bond, but is not subscribed to it, there is not as to such party a valid execution of the bond, and he cannot be held liable thereon on the supposition that he adopted the name in the body of the bond as a signing of it, even if the name was written there by himself. *Wild Cat Branch v. Ball*, 45 Ind. 213.

§ 2. **Filling up blanks.** A bond, executed in blank and filled up afterward by the express parol authority of the obligor, is valid; and the authority to fill up the blank is also authority to redeliver it. *Gibbs v. Frost*, 4 Ala. 720; see *Bell v. Keefe*, 13 La. Ann. 524; *Spencer v. Buchanan*, Wright (Ohio), 583; *Newlin v. Beard*, 6 W. Va. 110. But such parol authority may be revoked by parol also, and if revoked before the bond is completed, the authority is at an end. *Gibbs v. Frost*, 4 Ala. 720. And it has been held, that a paper signed and sealed in blank, with verbal authority to fill it up, which is afterward done, is void as to the party so signing, etc., unless he afterward deliver it, or acknowledge and adopt it. *Perminter v. McDaniel*, 1 Hill (S. C.), 267; *Byers v. McClanahan*, 6 Gill & J. (Md.) 250; *Ayers v. Harness*, 1 Ohio, 368; *Wynne v. Governor*, 1 Yerg. (Tenn.) 149. But see *contra*, *Wiley v. Moor*, 17 Serg. & R. (Penn.) 438; see also *Franklin Bank v. Bartlet*, Wright (Ohio), 742; *Sigfried v. Levan*, 6 Serg. & R. (Penn.) 308; *Bartlet v. Board of Education*, 59 Ill. 364; *McNutt v. McMahan*, 1 Head (Tenn.), 98. A bond with a blank left for the name of the obligee is a nullity. It imposes no liability upon the obligor, and confers no rights on him who receives. Nor can the name of the obligee be inserted by an agent authorized by parol. *Preston v. Hull*, 23 Gratt. (Va.) 600; S. C., 14 Am. R. 153; *Upton v. Archer*, 41 Cal. 85;

10 Am. Rep. 266, 267, 268, note; but see *contra*, *Field v. Stagg*, 52 Mo. 534; S. C., 14 Am. R. 435; *Van Etta v. Evenson*, 28 Wis. 33; 9 Am. Rep. 486; *Vose v. Dolan*, 108 Mass. 155; 11 Am. Rep. 331. See *ante*, art. 3, § 1; *Edelin v. Sanders*, 8 Md. 118. So, a bond signed by the defendant before the name of the obligee, or the amount thereof is inserted, is not the deed of the defendant, and cannot be recovered upon, although payments have been made thereon. *Barden v. Southerland*, 70 N. C. 528.

§ 3. **Delivery and acceptance.** Delivery is essential to the validity of a bond. *Wild Cat Branch v. Ball*, 45 Ind. 213; *McPherson v. Meek*, 30 Mo. 345; see *Stone v. Myers*, 9 Minn. 303. It is not perfected until delivery; where, therefore, a bond is signed on Sunday, and delivered on the day following, it is not void. *Commonwealth v. Kendig*, 2 Penn. St. 448; *Prather v. Harlan*, 6 Bush (Ky.), 185. Delivery to the payee or his agent is absolute at law, and its effect cannot be controlled by parol. *Madison, etc., Co. v. Stevens*, 10 Ind. 1. And it is held, that where the terms and form of a bond have been previously assented to, and the consideration paid by the obligee, such bond should be considered as having been delivered as soon as placed in any public conveyance, or in the hands of any person, to be delivered to the obligee. *Alcalda v. Morales*, 3 Nev. 132. So, if the obligor, after signing and sealing the bond, holds it out in his hand, and says to the obligee: "Here is your bond, what shall I do with it?" This is a sufficient delivery, though it never comes to the actual possession of the obligee. *Folly v. Vantuyt*, 9 N. J. L. (4 Halst.) 153; see *Ward's Appeal*, 35 Conn. 161. But where the obligor delivered the bond to a third person, to be delivered to the obligee, who never received it, the bond was held not binding. *State v. Oden*, 2 Harr. & J. (Md.) 108, *n.* And where a bond is not delivered to the obligee, and is put into his possession by one who has no authority to deliver it, the obligee cannot maintain an action upon it. *Fay v. Richardson*, 7 Pick. (Mass.) 91; *Fitts v. Green*, 3 Dev. (N. C.) 291; *Whitsell v. Mebane*, 64 N. C. 345. So, delivery in blank is an insufficient delivery, unless recognized after the blank is filled. *Edelin v. Sanders*, 8 Md. 118.

A bond cannot be delivered to the obligee, or to one of several obligees, as an escrow. *Moss v. Riddle*, 5 Cranch, 351; *Blume v. Bowman*, 2 Ired. L. (N. C.) 338; *State v. Chrisman*, 2 Ind. 126; *Perry v. Patterson*, 5 Humph. (Tenn.) 133. A delivery to one obligee is a delivery to all. *Moss v. Riddle*, 5 Cranch, 351.

But a bond may be delivered to the principal obligor as an escrow, by a surety. *Pauling v. United States*, 4 Cranch, 219. And parol evidence is admissible to show that a bond was delivered as an escrow, in such case. *Crawford v. Foster*, 6 Ga. 202; see *Bonce v. Kellett*, 11 id. 286; *Fertig v. Boucher*, 3 Penn. St. 308; *State v. Bodly*, 7 Blackf. (Ind.) 355. As the possession of a bond is *prima facie* evidence of a delivery. *Grim v. School Directors*, 51 Penn. St. 219; *Clark v. Ray*, 1 Harr. & J. (Md.) 323; *Blankman v. Vallejo*, 15 Cal. 638. So the signing, sealing, and delivery of a bond, are *prima facie* evidence of its acceptance and approval. *Wilson v. Ireland*, 4 Md. 444. And if an obligee once accepts a bond, he cannot afterward disagree to it, so as to make it void. *Bank of Newbern v. Pugh*, 1 Hawks (N. C.), 196; *Pequawket Bridge v. Mathes*, 8 N. H. 139.

If a bond is delivered on the day of its date, and accepted conditionally, to become absolute when the sufficiency of the sureties shall be certified by A, A's subsequent certificate will make it a valid delivery and acceptance from the date of the bond. *Seymour v. Van Slyck*, 8 Wend. 414. The law is well settled that a bond takes effect from its delivery; and the day of delivery may be shown whenever it becomes material. *Fournier v. Cyr*, 64 Me. 32.

ARTICLE V.

CONSTRUCTION AND EFFECT.

Section 1. Recitals. A recital in a bond preceding the condition is conclusive upon the parties as an admission of the fact recited, and may restrain the condition, the words of which imply a greater liability than the recital. *Bennehan v. Webb*, 6 Ired. L. (N. C.) 57; *Bell v. Bruen*, 1 How. 169; *Carpenter v. Buller*, 8 M. & W. 209; *Pearsall v. Summerset*, 4 Taunt. 593; *Fletcher v. Jackson*, 23 Vt. 581; and see *Hoke v. Hoke*, 3 W. Va. 561. But a recital of matter immaterial to the object of the bond works no estoppel against the party executing it. *Reed v. McCourt*, 41 N. Y. (2 Hand) 435.

§ 2. General rules. In giving construction to the condition of a bond, where the intention of the parties is manifest, the court will suppress insensible words, and supply accidental omissions, in order to give effect to that intention. *Dredell v. Barber*, 9 Ired. L. (N. C.) 250; *Whitsett v. Womack*, 8 Ala. 466; see *De-*

Soto v. Dickson, 34 Miss. 150. And the whole language of the condition of a bond is to be taken into consideration, in ascertaining the true construction of different parts of it. *Bank v. Willard*, 10 N. H. 210. If the condition, instead of specifying the particular purposes for which the bond is given, refers to a paper which does specify them, it is equivalent to the enumeration of these purposes in the bond. *United States v. Maurice*, 2 Brock. 96. So, an agreement, entered into at the same time that a bond is executed, and indorsed thereon, must in equity be considered a part thereof. *Hughes v. Sanders*, 3 Bibb (Ky.), 360; *Nichols v. Douglass*, 8 Mo. 49; see *Shermer v. Beale*, 1 Wash. (Va.) 11; *Gordon v. Frazier*, 2 id. 130. A bond single is to be taken most strongly against the obligor; but a condition annexed, being for his benefit, is to be taken most strongly in his favor. *Bennehan v. Webb*, 6 Ired. L. (N. C.) 57. And statutory bonds taken by officers of the court in the absence of the obligee are to be liberally construed. *Clayton v. Anthony*, 18 Gratt. (Va.) 578.

A bond, in form joint and several, but signed by one only, is a several bond, and if the obligor signs the names of others without authority from them, the effect of it is not changed.

Wood v. Ogden, 16 N. J. L. (1 Harr.) 453. A bond to pay a sum of money at the death of the obligor, drawn in absolute terms, and unconditionally delivered, takes effect as a present obligation, and is irrevocable. *Mack's Appeal*, 68 Penn. St. 231. Where a bond is conditioned for the payment of a sum certain, without specifying any time of payment, the money is due immediately without demand, and bears interest from the date of the bond. *Purdy v. Phillips*, 1 Duer (N. Y.), 369; S. C. affirmed, 11 N. Y. (1 Kern.) 406. See *Omohundro v. Omohundro*, 21 Gratt. (Va.) 626. A bond to appear, abide by and perform a judgment, secures payment of the judgment. *Cole v. Reilly*, 28 Ga. 431.

The very general disposition of the courts in this country is to regard the sum expressed in a bond as a penalty or security for the performance of the condition, and not as liquidated damages in cases where the parties have not expressly declared it to be certainly the one or the other. Therefore, if the agreement assumes the form of a bond, with a condition that it shall be void upon the performance or non-performance of an act, the *prima facie* presumption is, that the sum of money mentioned therein is intended merely as a security, and not as liquidated damages; and this presumption will stand until controlled by very strong

considerations. *Davis v. Gillett*, 52 N. H. 126. See *Swift v. Crow*, 17 Ga. 609; *Hargroves v. Cooke*, 15 id. 321; *Lyon v. Clark*, 8 N. Y. (4 Seld.) 148; *Griffiths v. Hardenbergh*, 41 N. Y. (2 Hand) 464.

§ 3. **Of particular words and phrases.** Where the condition of a bond is that the parties shall perform the decree of "the court," it means the court which shall ultimately decide the cause. *Archer v. Hart*, 5 Fla. 234; *United States v. Little Charles*, 1 Brock. 381. The words "jointly and severally," in a bond, must be construed distributively, so as to apply as well to the obligors as to their heirs. "We bind ourselves," makes them joint obligors; "we bind our heirs, executors and administrators," binds them jointly, and "we bind each and every of them," binds them severally. *Mitchell v. Darricott*, 3 Brev. (S. C.) 145. See *People v. Love*, 25 Cal. 520. A bond beginning, "I hereby bind myself," but signed by several, is the joint obligation of all the signers, or the several obligation of each. *Knisley v. Shenberger*, 7 Watts (Penn.), 193; and see *Leith v. Bush*, 61 Penn. St. 395; *Short v. Town of Lancaster*, 17 Ohio, 96; *Willey v. State*, 3 Ind. 500; *Supervisors of St. Joseph v. Coffenbury*, 1 Mich. 355.

A bond to devise "all my personal estate of every description, as well what I now have in possession as what I may receive at the decease of my mother," the obligor to keep possession of the property during his life, is not void for uncertainty. *Jenkins v. Stetson*, 9 Allen (Mass.), 128. And where the condition of a bond for the plaintiff's maintenance required the obligor to furnish to the obligee "money necessary for him to spend, whenever he thinks proper to visit his friends," it was held, that whenever, in the honest and fair exercise of his judgment, the obligee thought proper to make such visits, the obligor was bound to furnish money; but not, if exercised wantonly or capriciously. *Berry v. Harris*, 43 N. H. 376. In a bond to A B, administrator, "or" C D, administratrix, the word "or" will be taken to mean "and." *Brittin v. Mitchell*, 4 Ark. 92. See *Parker v. Carson*, 64 N. C. 530. And where it clearly appeared upon the face of the whole instrument that the name of "Wheeler" had by mistake been substituted for that of "Woodward" as the obligor in the condition of a bond of indemnity, the court construed the instrument as though the mistake had not occurred. *Richmond v. Woodward*, 32 Vt. 833. But where the defendant's name was Thomas B. Hanly, a bond for costs, filed by the plain-

tiff, executed to Thomas B. Han, was held insufficient. *Hanly v. Campbell*, 4 Ark. 562.

A senseless or repugnant condition will not affect the true intent of the bond; as if the condition be that "if the obligor do not pay." *Stockton v. Turner*, 7 J. J. Marsh. (Ky.) 192. And see *Gibbs v. Halstead*, 24 N. J. L. (4 Zab.) 366. When a bond is executed in one country with a view to its performance in another, the law of the latter country furnishes the rule for determining its obligation. *Carneal v. Day*, 6 Litt. (Ky.) 492.

§ 4. **Validity.** In treating of consideration, *ante*, 673, 674, art. 3, § 2, instances of an illegal consideration affecting the validity of bonds were given. Some general rules relating to the validity of bonds will be appropriate in this connection.

A bond to indemnify an officer against an unlawful act is void. *Anderson v. Farns*, 7 Blackf. (Ind.) 343. So, of a bond exacted by an officer, when he has no authority to require it. *Benedict v. Bray*, 2 Cal. 251. And a bond given to obtain a discharge from an unlawful imprisonment is obtained by duress, and is void. *Booker v. Lowell*, 49 Me. 429. See *Kavanagh v. Saunders*, 8 id. 422. And generally, a bond is void which shows upon its face an illegal consideration. *Greathouse v. Dunlap*, 3 McLean, 303. A bond for ease and favor is unlawful and void. But to constitute such bond it must be given to the officer who makes the arrest. *Claasen v. Shaw*, 5 Watts (Penn.), 468; *Baker v. Haley*, 5 Me. 240; *Clap v. Cofran*, 7 Mass. 101. Bonds given for the loan of money to be used in purchasing a forge, at which iron was to be made for the Confederate government, of which fact the obligee was duly informed, have been held void. *Logan v. Plummer*, 70 N. C. 388.

A bond to indemnify against an unlawful act or omission already past is not unlawful. *Given v. Driggs*, 1 Caines (N. Y.), 450; see *Griffiths v. Hardenberg*, 41 N. Y. (2 Hand) 464. And where a bond was given to the father of a female, reciting that she had borne an illegitimate child to the obligor, who consented to marry her, and binding the obligor to treat her as a loving and affectionate husband ought, and not to maltreat, abuse or desert her; it was held that the bond was not void as being against public policy. *Wyant v. Leshner*, 23 Penn. St. 338. And a bond not to sell intoxicating liquor within the limits of a town, or within a circuit of a mile around it, is not void as being in restraint of trade; because the whole course of legislation in regard to the sale of intoxicating liquors shows a

settled policy of the State to discourage such traffic. *Harrison v. Lockart*, 25 Ind. 112; see *Studabaker v. White*, 31 id. 211. So, a bond given for her support to a married woman by a person other than her husband cannot be considered invalid as subversive of good morals and tending to impair the obligations of the marriage covenant, when she had separated from her husband before the bond was given, and subsequently obtained a divorce, indicating that the separation was not her fault. *Farnum v. Bartlett*, 52 Me. 570.

As it regards a statutory bond the rule is stated to be, that such bond is absolutely void only when the statute declares it void. *Van Dusen v. Hayward*, 17 Wend. 67; *Ring v. Gibbs*, 26 id. 502. It is not void merely because it does not in all respects conform to the statute under which it is taken. *Ib.* See *Cobb v. Commonwealth*, 3 T. B. Monr. (Ky.) 391; *Nunn v. Goodlett*, 10 Ark. 89; *Commissioner v. Way*, 3 Ohio, 103; *State v. Layton*, 4 Harr. (Del.) 512; *Amos v. Allnut*, 10 Miss. 215; *Yale v. Flanders*, 4 Wis. 96. And the repeal of a statute has no effect upon the force or validity of a bond executed under it, and according to its requirements. *Tucker v. Stokes*, 11 id. 124. So, a bond required by statute may vary from the statutory requirements and still be a good common-law bond. *Lane v. Kasey*, 1 Metc. (Ky.) 410; *State v. Thompson*, 49 Mo. 188; *Hester v. Keith*, 1 Ala. 316; *Williams v. Shelby*, 2 Oreg. 144. Thus, a bond given for the prison liberties, though not strictly conformable to statute provisions, may be good by the common law; such bond not being for ease and favor. *Burroughs v. Lowder*, 8 Mass. 373; *Winthrop v. Dockendorff*, 3 Me. 240. By statute in Tennessee, a bond good at common law is a good statutory bond. *State v. Clark*, 1 Head (Tenn.), 369. A bond made payable to the "United States of America" would, it seems, be binding at common law; for the "United States of America" is a corporation endowed with the capacity to sue and be sued, to convey and receive property. *Dixon v. United States*, 1 Brock. 177.

Where bonds are issued to *bona fide* holders for value, and, under the judicial decisions of the State, are valid at the time of issue, subsequent decisions in that State cannot invalidate them. *City v. Samson*, 9 Wall. 477.

The rule in regard to bonds and other deeds void in part by common law, or by statute, is, that they are void as to such conditions, covenants, or grants as are illegal, and good as to all

others which are legal and unexceptionable. *Presbury v. Fisher*, 18 Mo. 50; *Whitted v. Governor*, 6 Port. (Ala.) 335; *United States v. Brown*, Gilp. 155; *Town of Montgomery v. Plank-Road Co.*, 31 Ala. 76; *Newman v. Newman*, 1 Stark. 101; *Yale v. Rex*, 6 Bro. P. C. 31; see *post*, art. 12, § 1. And when obligors acknowledge themselves to be severally indebted, the bond may be good as to part of them, and void as to the others. *Dickey v. Sleeper*, 13 Mass. 244. A bond, though void on the ground of usury, as a security for money, may be evidence of the amount of money advanced. *Campbells v. Patterson*, 11 Leigh (Va.), 13.

The rules as to the validity of a bond are thus briefly stated: Where the condition of a bond is originally impossible, the bond is absolute. Where the condition is originally illegal, the bond is void. Where the condition subsequently becomes impossible by the act of the obligor, or of a stranger, the bond is forfeited. Where it becomes impossible by the act of God, or of the law, or of the obligee, the bond is saved. *Beswick v. Swindells*, 3 Ad. & El. 868; *Anonymous* 5 Nev. & M. 378. See *Olive v. Aliter*, 14 Mo. 185; *Blake v. Niles*, 13 N. H. 459; *Mounsey v. Drake*, 10 Johns. 27; *Baylies v. Fettyplace*, 7 Mass. 338; *United States v. Mitchel*, 3 Wash. 95; *Bain v. Lyle*, 68 Penn. St. 60; *Green v. Smith*, 4 Cold. (Tenn.) 436.

§ 5. **Performance.** As a general rule, when no place is mentioned for the performance of a bond, it must be performed to the obligee in person. *Currier v. Currier*, 2 N. H. 75. But this rule has no application to the delivery of cumbersome articles, nor to cases in which the nature of the contract indicates a particular place of performance. *Ib.* If the condition of a bond be in the disjunctive, it may be discharged by performance of either of the enumerated acts, at the election of the obligor. An exception to the rule is, when the parties have saved the election to the obligee. *United States v. Thompson*, 1 Gall. (C. C.) 388.

It is held no bar to an action on a bond for performance of covenants, that the condition has become impossible by the death of the obligor. A compensation in damages may be awarded to the obligee, and the damages may be ascertained by an issue at law. *Miller v. Nichols*, 1 Bailey (S. C.), 226; but see *Badlam v. Tucker*, 1 Pick. (Mass.) 287. So, it is no excuse for the non-performance of a condition in a bond to clear land within a stipulated time, that the land was overflowed. *Sullivant*

v. *Reardon*, 5 Ark. 140. And a contract between the parties to a bond, that the acts required by the condition may be performed within a certain time beyond the time limited in the bond, and shall have the same effect as if performed within the time, is no excuse for non-performance of the condition, unless the contract is performed. *Washburn v. Mosely*, 22 Me. 160.

§ 6. **Breach.** To entitle a party to recover the penalty of a bond given for the faithful performance of a covenant, a technical infraction of its literal terms is not alone sufficient. It must be shown that some substantial right within the intent of the whole covenant has been infringed, or its purpose defeated. *Sevitsky v. Johnson*, 35 Cal. 41. And to constitute a breach of a bond to "indemnify and save harmless from any loss or damage to which a party may be subjected," there must be actual loss and damage, and not a mere liability to loss. *Aberdeen v. Blackmar*, 6 Hill (N. Y.), 324; *Fayerweather v. Willet*, 1 Edm. Sel. Cas. (N. Y.) 364; *Rector, etc., of Trinity Church v. Higgins*, 48 N. Y. (3 Sick.) 532, 537; see *Tate v. Booe*, 9 Ind. 13; *Franks v. Hamilton*, 29 Ga. 139; *Tufts v. Hayes*, 31 N. H. 138.

Owning stock in, or being employed by a corporation in carrying on a manufacturing business, is a breach of the condition of a bond not to engage in that business within certain limits. *Whitney v. Slayton*, 40 Me. 224. So, a condition that the obligor shall pay all the just debts which the obligee "now owes," is broken by an omission to pay, at maturity, a note given by the obligee, although the holder of the note does not demand nor desire payment. *Stewart v. Clark*, 11 Metc. (Mass.) 384. So, a bond conditioned to furnish to the obligee and his wife, all necessary meat, drink, lodging, washing, clothes, etc., during both and each of their natural lives, is an entire contract; and a failure by the obligor to provide for the obligee and his wife according to the substance and spirit of the covenant, amounts to a total breach, and full and final damages may be recovered, as well for the future as for the past. *Shaffer v. Lee*, 8 Barb. 412; see *Jenkins v. Stetson*, 9 Allen (Mass.), 128. And where the importation of negroes was prohibited by statute, after a bond had been given to import and deliver a certain number of them, it was held, that although the bond could not lawfully be fulfilled specifically, yet the obligor was liable for the value of the negroes, in money. *Rose v. MacLeod*, 2 Bay (S. C.), 108. The condition of a certiorari bond is broken if the

certiorari is dismissed for want of prosecution. *Marryott v. Young*, 33 N. J. (Law) 336.

The condition of a bond is not impossible if it may be performed by the aid of the obligee. If, therefore, the obligee neglect or refuse to act, in such case, the condition is saved. *Pindar v. Upton*, 44 N. H. 358.

ARTICLE VI.

RELEASE AND DISCHARGE.

Section 1. In general. An obligee may release one of two *several* obligors named in a bond, or cancel the bond as to one, by tearing off his seal, without the consent of the other; for the reason that it does not increase the responsibility of the other obligor, or in any manner change the nature of his obligation. *Matthewson's Case*, 5 Co. 44; *Burson v. Kincaid*, 3 Penn. 57; But if the name of one of two or more *joint* obligors be stricken out or erased, or his seal be torn off from a bond by the consent of the *obligee* and the *other obligors*, it shall cease to be the bond of him whose name is so stricken out or erased from it; but it shall from that time be the bond of the others. *Ib.*; *Rogers v. Hosack*, 18 Wend. 319; see *Speaker v. The United States*, 9 Cranch, 28; *Barrington v. The Bank of Washington*, 14 Serg. & R. (Penn.) 424. So, a release by the obligee of a bond, of one of the sureties thereon, after he has paid his proportionate share of the sum due upon a breach thereof, does not discharge his co-sureties. *State v. Atherton*, 40 Mo. 209.

The sureties in a penal bond are not discharged by the bankruptcy of the principal obligor. *Garnett v. Roper*, 10 Ala. 842. And although an obligee in a bond, on the receipt of part of his debt, discharge the principal from the custody of the sheriff when taken on a *ca. sa.*, and discontinue a suit brought by him against the principal, who had been arrested, yet the surety on the bond will not be thereby discharged. *Lawson v. Snyder*, 1 Md. 71. But the delivery by the obligee, to a third person, of a bond secured by a trust mortgage, upon the understanding that the third person is to deliver the bond to the obligor, and himself assume the payment of the debt followed by a delivery of the bond to the obligor by such third person, will, in the absence of fraud, operate as a cancellation of the bond, and a discharge of the trust. *Piercy v. Piercy*, 5 W. Va. 199. A mere agreement to cancel a bond, without an actual cancellation, will not, however, render it void. *Barrett v. Barron*, 13 N. H. 150.

ARTICLE VII.

NEGOTIABLE BONDS.

Section 1. What are. It is now settled by the current of American authorities that a coupon bond of a municipal, or a business corporation, is negotiable, and that its coupons are also negotiable, and may be detached and negotiated separately by simple delivery, and sued on separately from the bond, and this after the bond itself has been paid and satisfied, as well as before.

White v. Vermont and Mass. R. R. Co., 21 How. 577; *County of Beaver v. Armstrong*, 44 Penn. St. 63; *Thompson v. Lee County*, 3 Wall. 327; *Meyer v. Muscatine*, 1 id. 384; *Gelpecke v. Dubuque*, id. 175; *Murray v. Lardner*, 2 id. 110; *City v. Lamson*, 9 id. 477; *Blake v. Livingston Co.*, 61 Barb. 149; *Langston v. S. C. R. R. Co.*, 2 S. C. 248; *Craig v. City of Vicksburg*, 31 Miss. 217; *Clark v. City*, 10 Wis. 140; *Johnson v. County*, 24 Ill. 92; *Arents v. Com.*, 18 Gratt. (Va.) 750; *Spooner v. Holmes*, 102 Mass. 503; *Nat. Exchange Bank v. Hartford, etc., R. R. Co.*, 8 R. I. 375; S. C., 5 Am. R. 582. But see *Diamond v. Lawrence Co.*, 37 Penn. St. 358; *Myers v. York & Cumberland R. R.*, 43 Me. 239. Such bonds were at first held non-negotiable by the courts, because they were sealed instruments. Subsequently they came to be acknowledged as negotiable instruments, and the holders of them were protected to the same extent as the holders of negotiable notes and bills under the law merchant. A little later, they came to be recognized as negotiable in as full and complete a manner as bank bills or the national currency of the country. And now, they stand not only equal before the law to the negotiable paper pertaining to the commercial business of the country, and to our circulating medium, but they are also, for their greater advantage, and for the purpose of causing them to be accepted as among the most desirable investments for capital in the monetary centers of the world, regarded as chattels; in so far as that character shall tend to relieve them from defenses and burdens incident to choses in action merely, and give to them a merchantable and vendible quality. *Griffith v. Burden*, 35 Iowa, 138. The later English chancery cases hold that such bonds are either promissory notes, or else analogous to the letter of credit. See *In re Imperial Land Co. of Marseilles, etc.*, L. R., 11 Eq. 478; *In re General Estates Co., etc.*, L. R., 3 Ch. App. 758. Interest warrants or

coupons, in a negotiable form, draw interest after the payment of them is unjustly neglected or refused. *Mills v. Jefferson*, 20 Wis. 50; *San Antonio v. Lane*, 32 Tex. 405; *Aurora City v. West*, 7 Wall. 82; *North Penna. R. R. v. Adams*, 54 Penn. St. 94.

§ 2. **Rights of bona fide holder.** The purchaser of a negotiable bond, for value advanced, in good faith, is unaffected by want of title in the vendor. And the burden of proof, on a question of such faith, lies on the party who assails the possession. *Keeney v. Chilis*, 4 Greene (Iowa), 416; *Murray v. Gardner*, 2 Wall. 110; *Carpenter v. Rommel*, 5 Phila. (Penn.) 34. Nor is the purchaser of such a bond in open market, and in the usual course of business, bound to make a critical examination in order to escape the imputation of bad faith in the purchase. *Welch v. Sage*, 47 N. Y. (2 Sick.) 143; S. C., 7 Am. R. 423. Negligence even will not impair his title. *Ib.* And see *Seybel v. Nat. Currency Bank*, 54 N. Y. (9 Sick.) 288.

A *bona fide* purchaser, without notice, of stolen negotiable bonds has a good title to them against the former owner. *Carpenter v. Rommel*, 5 Phila. (Penn.) 34. So the wrongful putting in circulation of the bonds of a foreign government, payable to bearer, and transferable by delivery by an agent of the obligors having them in custody, will not invalidate the title of a purchaser for value, and without notice. *Leavitt v. Morgan*, 7 Robt. (N. Y.) 350; S. C., 37 How. 264; 3 Abb. (N. S.) 469. And it was held, that an action for a conversion would not lie against one who had received, as agent, in good faith, and had sold stolen coupons of United States bonds, and who had turned over the proceeds to his principal. *Spooner v. Holmes*, 102 Mass. 503; S. C., 3 Am. R. 491; and see *State v. Wells*, 15 Cal. 336.

Government bonds, payable to bearer, purchased after the date at which they are redeemable, are held to be taken subject to all equities. *Texas v. White*, 7 Wall. 700; S. C., 25 Tex. 465.

ARTICLE VIII.

OFFICIAL BONDS.

Section 1. Construction and effect of. As it regards an official bond, it is held that if the statute prescribing the conditions of such bond enumerates particular duties, and also contains general words which include his whole duty, an obligor in a bond

taken under such statute is not discharged from such general obligation by an omission of such particular enumeration. *The Justices v. Wynn*, Dudley (Ga.), 22. So an official bond cannot be restricted from operating according to its terms, by any parol evidence of conversation between the principal and sureties at the time of its execution, not known to the officer whose business it was to approve the bond. *McKee v. Commonwealth*, 2 Grant's Cas. (Pa.) 23. A bond for faithful performance is to be construed, no less as to the surety than the principal, with reference to the situation of the parties, and the hazards against which the obligee exacted security. *Rochester City Bank v. Elwood*, 21 N. Y. (7 Smith) 88. Thus, a bond conditioned for the faithful discharge by one of the obligors of "the trust reposed in him as assistant book-keeper" of a bank, is an engagement that he will not avail himself of his position to misapply or embezzle the funds of his employer, and the appropriation by the book-keeper of the bank's money, and making fraudulent entries to avoid detection, is a breach of the bond as against a surety therein. *Ib.* But the sureties on the official bond of a county clerk are not liable for sheriff's fees collected by the clerk, and not paid over to the sheriff. *State v. Givan*, 45 Ind. 267.

The obligor and his sureties in an official bond are estopped from denying the regularity of the principal's election, or his official character. *People v. Jenkins*, 17 Cal. 500.

§ 2. **Validity.** A bond executed by a public officer and sureties, though not good as a statutory bond, may be binding as a voluntary obligation, and an action at common law may be maintained thereon. *Goodrun v. Carroll*, 2 Humph. (Tenn.) 500; *Branch v. Elliot*, 3 Dev. L. (N. C.) 86. And see *Vanhook v. Barnett*, 4 id. 268; *State v. Bartlett*, 30 Miss. 624.

If the condition of an official bond substantially conforms to the requirements of the law, and imposes no additional obligation, it will be deemed good as a statutory bond. *Boring v. Williams*, 17 Ala. 510. So, an excess in the penalty of an official bond is bad only as to the excess. *M'Caraher v. Commonwealth*, 5 Watts & S. (Penn.) 21. See *Polk v. Plummer*, 2 Humph. (Tenn.) 500; *Lee v. Waring*, 3 Desau. (S. C.) 57. And such a bond, executed by the sureties only, and not by the principal, is valid against the sureties. *State v. Bowman*, 10 Ohio, 445. It is likewise held that the bond of a public officer is valid, notwithstanding the penalty is made payable to himself in another capacity. *Marshall v. Hamilton*, 41 Miss. 229.

If new duties are imposed upon a public officer, by statute, after the execution of his official bond by his surety, the bond should be held good against the surety to the extent of the duties lawfully covered by it, though it may not be good as to the new duties imposed since its execution. *Commonwealth v. Holmes*, 25 Gratt. (Va.) 771.

§ 3. **Rights and liabilities, under.** Where an officer, who is elected annually, gives a bond for the faithful discharge of the duties of his office, he and his sureties are bound only for one year, although there is no time specified in the bond, and although the officer should be re-elected several years in succession. *Bigelow v. Bridge*, 8 Mass. 275 ; *South Carolina Society v. Johnson*, 1 McCord (S. C.), 41. But where the law provides that an officer shall hold until his successor is qualified, his bond covers his acts so long as he holds. *Thompson v. State*, 37 Miss. 518. And the obligors in a bond given to the directors of a company, who are chosen annually, for the fidelity of an agent of the company, are liable after the year has expired ; and the obligees, though out of office, may maintain an action on the bond. *Anderson v. Longden*, 1 Wheat. 85.

The person who first sues and obtains judgment on an official bond is entitled to the whole penalty, if his demand amount to so much, in exclusion of other claimants. *Christman v. Commonwealth*, 17 Serg. & R. (Penn.) 381. See *Glidewell v. M'Gaughey*, 2 Blackf. (Ind.) 357. And this rule holds, although the party who first sues is prevented from obtaining judgment, by a stay of proceedings, on the defendant's paying into court the penalty of the bond. *McKean v. Shannon*, 1 Binn. (Penn.) 370.

§ 4. **Breach.** Generally, a bond conditioned faithfully to execute the duties of an office is broken only by gross negligence. An honest error in judgment, or want of skill, will not amount to a breach. *Common Council of Alexandria v. Corse*, 2 Cranch (C. C.), 363. But see *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. (U. S.) 46, 69.

§ 5. **Discharge.** As it regards their liability on a bond, there is no distinction between principal and surety ; and the same act, or neglect, which charges the former must also charge the latter. *Seaver v. Young*, 16 Vt. 658. See *State v. Blakemore*, 7 Heisk. (Tenn.) 638 ; *Charles v. Hoskins*, 14 Iowa, 471. But the sureties on an official bond are responsible only for acts of the officer subsequent to the time when the bond is given. *Jeffers v. John-*

son, 18 N. J. L. (3 Harr.) 382 ; *Myers v. United States*, 1 McLean, 493. And they can be held for no more than the amount of the penalty of the bond. *State v. Blakemore*, 7 Heisk. (Tenn.) 638. So, where the appointment of the officer is annual, a surety is not liable for his defaults arising after the year, although the officer continues such by law until his successor is appointed. *The Mayor v. Horn*, 2 Harr. (Del.) 190. He is liable, however, for the neglect of his principal to pay over moneys which came into his hands before the surety executed the bond, and which were still there at the time of such execution. *State v. Van Pelt*, 1 Ind. 304.

A discharge of one surety discharges his co-sureties, in the absence of a statute to the contrary, as it takes away their right of contribution ; and a statute to the contrary, being in derogation of the common law, is to be strictly construed. *People v. Buster*, 11 Cal. 215. But an official bond, being given for official good conduct, is not discharged by a faithful accounting for moneys to the amount of the penalty ; it stands good as a security for losses and defalcations to that amount. *Potter v. Titcomb*, 7 Me. 302, 319.

The cancellation of an official bond by an unauthorized officer is no evidence of satisfaction. *Ford v. Jefferson*, 4 Greene (Iowa), 273.

§ 5. **Of United States officers.** The United States have, in their political capacity, a right to enter into a contract, or to take a bond in cases not previously provided for by some law. Thus, a bond voluntarily given by a collecting or disbursing officer and his sureties, to the United States, through the proper department, to secure the faithful performance of his duties, is a valid contract, though the taking of such a bond may not be prescribed by any act of congress. *Postmaster-General v. Rice*, Gilp. 554 ; *United States v. Tingey*, 5 Pet. 115. So the postmaster-general has authority to take bonds of his deputies conditioned for faithful performance of their duties, and to pay all moneys that shall come to their hands for postage, etc. *Postmaster-General v. Early*, 12 Wheat. 136. But no officer of the government has the right to require from any subordinate officer, as a condition for his holding office, that he should execute a bond with a condition different from that prescribed by law ; and a bond thus obtained is illegal and void. *United States v. Tingey*, 5 Pet. 115.

A bond given by a postmaster, with sureties, for the performance of his official duties, is not binding until it is approved and

accepted by the postmaster-general. *Postmaster-General v. Norvell*, Gilp. 121.

A civil officer has a right to resign his office at any time, and, after his resignation has been received by the proper department, his surety is not bound for his faithful performance of the duties of the office. *United States v. Wright*, 1 McLean, 509. Though, if the resignation, in its terms, is not to take effect until a successor shall be appointed, the effect may not be to relieve the surety. *Ib.*

§ 6. Of sheriffs, constables, etc. The bonds of sheriffs, constables, tax collectors, and various other officers, are regulated by statute in the several States. The statute law of the particular State should, therefore, be consulted on the subject, in connection with the judicial decisions giving construction thereto.

ARTICLE IX.

INDEMNITY BONDS.

Section 1. In general. See *ante*, 686, art. 5, § 6. An obligee in an indemnity bond, upon being damnified, has an immediate right to be re-imbursed. *Challoner v. Walker*, 1 Burr. 574; see *Rockfeller v. Donnelly*, 8 Cow. 639; *Jones v. Cooper*, 2 Aik. (Vt.) 54; *Ramsay v. Gervais*, 2 Bay (S. C.), 145. One who agrees to indemnify and save others harmless against a certain engagement is bound to secure them from incurring any expense, as it runs on at the time, which falls upon them by virtue of that engagement. *Sparks v. Martindale*, 8 East, 593. And it is held that a principal upon a bond conditioned for the indemnity of the obligee against the payment of money is liable at the common law beyond the penalty of the bond, where the excess consists of interest accrued after the breach of the condition. *Lyon v. Hall*, 1 E. D. Smith (N. Y.), 250; S. C. affirmed, 8 N. Y. (4 Seld.) 148. So, under a bond to save harmless, a judgment against the obligee fixes the obligor's liability, and the obligee may pay it without waiting for execution. *Creamer v. Stephenson*, 15 Md. 211; *Jones v. Childs*, 8 Nev. 121; see *Tate v. Booe*, 9 Ind. 13; *Given v. Driggs*, 1 Caines, 450. It has been held that no greater sum than that mentioned as a *penalty* in a bond given upon the issuing of an injunction can be recovered in an action, or in proceedings on motion against the sureties. *Hovey v. The Rubber Tip Pencil Co.*, 6 Jones & Sp. (N. Y.) 428.

on the covenants. In covenant, he may recover as often as the breach arises, and even beyond the penalty. But having elected to proceed in debt on the penalty, he cannot then go on the covenant. *New Holland Turnp. Co. v. Lancaster County*, 71 Penn. St. 442; *Perkins v. Lyman*, 11 Mass. 83; *McLaughlin v. Hutchins*, 3 Ark. 207; *Martin v. Taylor*, 1 Wash. 1.

§ 2. When an action lies. The right of action upon a bond of indemnity against "liability" is complete when the obligee becomes legally liable for damages. *Bancroft v. Winspear*, 44 Barb. 209; *Chace v. Hinman*, 8 Wend. 452. As for example, by a judgment, though no actual damage is shown. *Jones v. Childs*, 8 Nev. 121. See *ante*, 693, art. 9, § 1. Action may be brought on a bond for a sum payable on demand, without demand. *Husbands v. Vincent*, 5 Harr. (Del.) 268; *Omohundro v. Omohundro*, 21 Gratt. (Va.) 626. And a bond payable "with interest from date, the interest to be paid annually," is due and payable from date, and no demand need be made before suit brought. The interest, in such case, becoming due at the end of each year, is not barred by any statute of limitation which does not bar a suit on the bond itself. *Knight v. Bradswell*, 70 N. C. 709. And when the obligor in a bond for the conveyance of land has conveyed the land to a third person by a deed of warranty made "subject to the incumbrance created by the bond," no demand for a conveyance need be made on the obligor prior to the commencement of an action upon the bond. *McCarthy v. Mansfield*, 56 Me. 538. In Pennsylvania, an action may be maintained against the sureties of a public officer immediately on the settlement of his account. *Speck v. Commonwealth*, 3 Watts & Serg. (Penn.) 324. And see *Governor v. Matlock*, 1 Dev. L. (N. C.) 214.

An action may be maintained on a bond payable on a day certain, at a place named, without allegation or proof of demand of payment at the time and place mentioned. *Langston v. South Carolina R. R. Co.*, 2 S. C. 248; *Truman v. McCollum*, 20 Wis. 360. So, where a penal bond becomes payable upon a breach of the condition, and the principal obligor is the party by whom the condition is to be performed, such principal obligor must have knowledge of the breach, if one exists, and no notice or request is necessary to fix his liability. The co-obligors of the principal upon such a bond stand as sureties only between themselves and the principal; but as to the obligee of the bond, they are liable in all respects as principals, and are

entitled to no notice or request to which the principal is not entitled. *Bulkley v. Finch*, 37 Conn. 71.

The maker of a bond has the whole day on which it falls due in which to pay it, cannot be sued upon it until the next day. *Zachery v. Brown*, 17 Ark. 442.

§ 3. Upon what state of facts. The condition of a bond was, that a holder should not prosecute the sureties till he had exhausted all legal remedies against the principal. Suit was brought in the first instance against the sureties, and it was held not to violate the condition, the principal being totally insolvent. *Heralson v. Mason*, 53 Mo. 211. In an action upon a penal bond the judgment, in form, is for the penalty; and it is held, that the right to this judgment is not affected by the assignment by the plaintiff of a breach of the condition of the bond, as one of the facts constituting his cause of action, as such assignment of a breach should be made. *Western Bank v. Sherwood*, 29 Barb. 383. See *Howard v. Farley*, 18 Abb. (N. Y.) 260. Where a penal bond is given to secure the performance of certain work, and the condition of the bond is broken, and a suit is brought on the bond for indemnity, it is sufficient to sustain the action, that there had been a breach of the condition at the time the suit was commenced; and such damages may be included in the assessment as the obligee has been subjected to by the breach of the condition of the bond, although they may have accrued after the suit was commenced. *Spear v. Stacy*, 26 Vt. 61.

If the obligees in a bond conditioned for their support voluntarily cease to receive such support during six years, no action can be maintained upon such bond until after demand for, and refusal to afford, such support. *Stickney v. Stickney*, 1 Fost. (N. H.) 61.

Where a money bond is made payable in installments at different times, debt will lie thereon after all the installments have become due, but not to recover the amount of one installment. *State v. Scoggin*, 5 Eng. (Ark.) 326. Where all the installments have not become payable, the remedy is by action for breach of the covenant. *Ib.* But where more than one installment has become due, separate actions will not lie to recover each. *Ib.* See *Hopkins v. Deaves*, 2 Browne (Penn.), 93; *Black v. Caruthers*, 6 Humph. (Tenn.) 87; *Warwick v. Matlock*, 7 N. J. L. 200.

It is held, that the obligee, in a bond to indemnify him for having given a receipt to an officer, for goods attached, is damaged by an attachment of his property in a suit on his receipt,

and may thereupon bring an action on his bond. *Otis v. Blake*, 6 Mass. 336. And see *Murrell v. Johnson*, 1 Hen. & M. (Va.) 450; *Kip v. Brigham*, 7 Johns. 168.

Where the condition of a bond was, that the defendant should carry on the business of distilling cider brandy for seven years and three months, and keep an exact account of the quantity distilled, and deliver to the plaintiff, when demanded, one-tenth part thereof, and the defendant did carry on such business, but kept no account and delivered nothing to the plaintiff; it was held, that the latter could have no action on the bond until the end of the specified term. *Cottle v. Payne*, 3 Day (Conn.), 289.

When a bond or other contract has been surrendered or satisfied by reason of mistake or fraud, it may be treated as a valid and subsisting instrument. But where the only error apparent was that the plaintiff, through his own neglect, inattention, or ignorance, allowed a settlement to be made, and his bond to be discharged by his attorney, without claiming a full performance of its conditions, no suit can be maintained on the bond. *Chapman v. Lothrop*, 39 Me. 431.

By the common law, a bond may be good, and may be enforced by suit, although the obligee has no beneficial interest in it. *Hoxie v. Weston*, 19 Me. 322.

In a recent case in North Carolina, it is held that no action can be sustained upon a bond payable after the ratification of a treaty of peace between the United States and the Confederate States. This is the language of the Confederate treasury notes; and the plain and universally understood meaning of those notes was, that if the Confederate States obtained independence, then their notes would be paid, otherwise not. When the parties to the bond adopted the language of the Confederate treasury notes, they adopted their well-understood meaning; and as there has been no treaty, and no ratification, and as peace exists, but not by ratification of a treaty, nor yet by the independence of the Confederate States, the condition precedent has not been performed, and never can be. *McNinch v. Ramsey*, 66 N. C. 229. See *Garlington v. Priest*, 13 Fla. 559. But a bond, executed in 1864, conditioned for the delivery of Confederate bonds, the consideration being Confederate treasury notes loaned to the maker of the bond, was held not illegal and void; and that a recovery might be had thereon for its value in United States currency to be estimated according to the scale prescribed by law. *Haughton v. Merony*, 65 N. C. 124; and see *Thorington v. Smith*, 8 Wall. 1.

ARTICLE XII.

DEFENSE TO ACTION ON BOND.

Section 1. Grounds of, in general. It is a general rule, that an obligor may avoid a bond, by showing that it was obtained by fraud or duress, or that the consideration is illegal or against the policy of the law. *Page v. Trufant*, 2 Mass. 159. Numerous illustrations of this rule are given, *ante*, 673, 683, art. 3, § 2; art. 5, § 4. It was stated in an English case, that since the decision in *Pole v. Harrobin*, reported 9 East, 416, *n.*, it has been generally understood that an obligor is not restrained from pleading any matter which shows that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond. *Paxton v. Popham*, 9 East, 408, 421. And see *Greville v. Atkins*, 9 Barn. & C. 462. But the illegality must, as a matter of substance, be made to appear clearly and with certainty upon the face of the plea. *Royal British Bank v. Turquand*, 5 El. & Bl. 243; *Hill v. M. & S. Water-Works Co.*, 2 B. & Ad. 552; 1 Smith's Lead. Cas. 499. As if the statute of 9 Anne, cap. 14, against gaming, be pleaded to a bond, the plea must show at what game the money was lost. *Colborne v. Stockdale*, 1 Strange, 493.

The illegality pleadable in defense to an action upon a bond may be such as exists at common law, or it may arise from a statutory enactment. In addition to the illustrations of the first kind given in preceding articles, may be mentioned the case of a bond by which each of the parties binds himself not to work or employ others to work for him, except at certain rates prescribed by the terms of the bond. Such a bond, being in restraint of trade, is void. *Hilton v. Eckersley*, 6 El. & Bl. 47; S. C. affirmed, *id.* 66. So, covenants in a separation deed that the husband shall part with the control over his children, are void at common law, on the ground of public policy. *People v. Mercein*, 3 Hill (N. Y.), 399; 8 Paige, 47; *Vansittart v. Vansittart*, 2 De G. & J. 249. And where a bond was to secure money agreed to be given for the discharge of a person unlawfully impressed, it was held void. *Pole v. Harrobin*, 9 East, 416, *n.*

Illegality created by statute is no less fatal to the validity of a bond. *Bank of United States v. Owens*, 2 Pet. 527, 539; *Barton v. Port Jackson Plankroad Co.*, 17 Barb. 397. Nor is it necessary that the statute should contain words of positive prohibi-

tion. *Ib.* The principle is stated to be that every contract made for or about any matter or thing which is prohibited and made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute. *Begins v. Armistead*, 10 Bing. 110. And see *Coburn v. Odell*, 10 Fost. (N. H.) 540; *Elkins v. Parkhurst*, 17 Vt. 105; *Stanly v. Nelson*, 28 Ala. 514. It was held in some of the earlier English cases that where there are several conditions to a bond, and any one of them is void by statute, the whole bond is void. *Norton v. Syms*, Hob. 14; S. C., Moore, 856; *Lee v. Colshill*, Cro. Eliz. 599; *Newman v. Newman*, 4 M. & S. 68. But this rule must be now understood to apply only to cases where the statute enacts that all instruments containing any matter contrary thereto, shall be void; otherwise, the common-law rule will apply, and that part only will be void which contravenes the provisions of the statute. *Gaskell v. King*, 11 East, 165; *How v. Synge*, 15 id. 440; *Yundt v. Roberts*, 5 Serg. & R. (Penn.) 139; 1 Sm. Lead. Cas. 502; *ante*, 683, art. 5, § 4.

If a bond be given to compound a felony, it is a good defense in an action on the bond. *Steuben County Bank v. Mathewson*, 5 Hill (N. Y.), 249; *Collins v. Blantern*, 2 Wils. 357. See also *Bowen v. Buck*, 28 Vt. 308; *Shaw v. Reed*, 30 Me. 105; *Fay v. Oatley*, 6 Wis. 42; *Osbaldiston v. Simpson*, 13 Sim. 513. So, it is a good defense in an action upon a *ne exeat* bond, that the defendant has paid the costs, and that the writ issued upon good cause. *Coombs v. Newton*, 4 Blackf. (Ind.) 120. And the plaintiff's non-performance of a condition precedent may be pleaded in bar of an action on a bond. *Patterson v. Salmon*, 3 id. 131.

The surety on a bond is entitled to set up any legal or equitable defense which would have availed his principal, such as a set-off, counter-claim, etc. And he may introduce any evidence tending to show such defense. *Jarratt v. Martin*, 70 N. C. 459.

§ 2. **Denying execution.** The defendant, in an action upon a bond executed by him, cannot plead matter contradictory to the bond. *Miller v. Elliott*, 1 Ind. 484. And a plea that the bond declared on was executed under a mistaken impression of its legal effect, made on the defendant's mind by the plaintiff, is bad. *Ib.* So, on *non est factum* pleaded, the defendant cannot show that the bond signed was represented to be of a different

amount. *Evans v. Hudson*, 5 Harr. (Del.) 366. He should plead *per fraudem*. *Ib.* See *Dorr v. Munsell*, 13 Johns. 430. But where a party appears to have executed a bond with another as surety, but whose name has been forged, he will not be liable. *Seely v. People*, 27 Ill. 173.

§ 3. **Impeaching consideration.** The rule of the common law is, that in an action on a bond, conditioned for the payment of a certain and ascertained sum of money within a specified time, it is not competent for the obligors to go behind the bond for the purpose of showing what was its consideration, or that the consideration has failed. *Dorlan v. Sammis*, 2 Johns. 179, *note*; *Dorr v. Munsell*, 13 *id.* 430; *Bates v. Hinton*, 4 Mo. 78; *Van Valkenburgh v. Smith*, 60 Me. 97; *Harris v. Harris*, 23 Gratt. (Va.) 737; *Gray v. Barton*, 55 N. Y. (10 Sick.) 68, 71. The only answer that can be made to it is *non est factum*, payment, or release. *Mitchell v. Williamson*, 6 Md. 210. But this rule is not recognized in South Carolina. See *Thompson v. McCord*, 2 Bay (S. C.), 76. And under the laws of California, a sealed instrument, *prima facie*, imports a consideration, subject, however, to rebuttal. *McCarty v. Beach*, 10 Cal. 461. So, in a number of the States as New York, Ohio, Tennessee, Indiana, Kentucky, Missouri, etc., the impeachment of the consideration of a bond is allowed by statute, and a failure of consideration may be pleaded in bar to a recovery on a bond. See *Case v. Boughton*, 11 Wend. 106; *Craver v. Wilson*, 4 Abb. Ct. App. (N. Y.) 374; *Peebles v. Stevens*, 1 Bibb (Ky.), 500; *Flack v. Cunningham*, 3 Blackf. (Ind.) 131; *Smith v. Busby*, 15 Mo. 387; *Greathouse v. Dunlap*, 3 McLean, 303; Tenn. Code, § 1806.

In North Carolina it is held, that no consideration, or a failure of consideration, is any defense on a bond against an assignee for value and without notice of any claim of the defendant, as maker. *Parker v. Flora*, 63 N. C. 474. So, in an action on a bond, mere inadequacy of consideration is no defense, in the absence of fraud or imposition; nor, in such case, is it an objection in an action for specific performance. So, held, in an action on a bond given for the price of a mule, which had a latent disease, of which it died within a week of the sale, without having rendered any service of value. *Winslow v. Wood*, 70 *id.* 430.

§ 4. **Averment of fraud.** See *ante*, 676, art. 4, § 1. At common law, fraud could not be pleaded, or given in evidence as a defense to an action on a specialty, unless the *execution* of the instrument was vitiated. An obligor might, therefore, avoid his bond

by showing that it was misread, or its purport falsely declared at the time of its execution. *Dorr v. Munsell*, 13 Johns. 430; *Anthony v. Wilson*, 14 Pick. (Mass.) 303; *Schuylkill County v. Copley*, 67 Penn. St. 386; S. C., 5 Am. R. 441. But he could not show that he had been induced to execute it, by fraudulent representations as to the nature or value of the consideration on which the bond was founded. *Dale v. Roosevelt*, 9 Cow. 309; *Stevens v. Judson*, 4 Wend. 471; *Baur v. Roth*, 4 Rawle (Penn.), 83; *Donaldson v. Benton*, 4 Dev. & Bat. (N. C.) 435; *Hudson v. Williams*, 3 Blackf. (Ind.) 170; *Wyche v. Macklin*, 2 Rand. (Va.) 426. This distinction is, however, disregarded in some of the States. See *Bliss v. Thompson*, 4 Mass. 492; *Hazard v. Irwin*, 18 Pick. (Mass.) 95; *Hoitt v. Holcomb*, 3 Fost. (N. H.) 535; *Phillips v. Potter*, 7 R. I. 289; *Tomlinson v. Mason*, 6 Rand. (Va.) 169; *Hartshorn v. Day*, 19 How. (U. S.) 211, 222. While in other of the States, it has been abolished by statute. See *Case v. Boughton*, 11 Wend. (N. Y.) 106; *Waring v. Cheeseborough*, 1 Hill (S. C.), 187; *Swift v. Hawkins*, 1 Dall. (Pa.) 17; *Huston v. Williams*, 3 Blackf. (Ind.) 171. And deceit or artifice practiced by one party for the purpose of misleading the other, with regard to the nature or value of the consideration, or any other material fact or circumstance, may be given in evidence as a defense to an action on a specialty at law, with the same effect as if the contract were by parol. *Boynton v. Hubbard*, 7 Mass. 492; *Somes v. Skinner*, 16 id. 348.

To avoid a bond on the ground that it was fraudulently obtained, it should appear that the obligee had an agency in the alleged fraud. *Jenners v. Howard*, 6 Blackf. (Ind.) 240. But if the obligor knew of the fraud, before he executed the bond, he cannot impeach it on that ground. *Higgs v. Smith*, 3 A. K. Marsh. (Ky.) 338. Where the obligee either personally or through his agent procures a party to act as surety for the obligor through fraudulent representation, the bond will be held void as to such surety. *Gasconade County v. Sanders*, 49 Mo. 192.

If a party seeks to relieve himself from the obligation of his bond, on the ground of actual fraud or misrepresentation, he must establish that there was a false representation of a matter of substance, important to his interests, and which actually misled him to his hurt. *Fulton v. Hood*, 34 Penn. St. 365. And a false affirmation of a matter resting in opinion, or even of a fact equally open to the knowledge or inquiry of both parties, is not available for such purpose. *Ib.* See *Mason v. Ditchbourne*, 1

M. & Rob. 460 ; *Stone v. Compton*, 5 Bing. N. C. 145 ; *Graves v. Tucker*, 10 Sm. & M. (Miss.) 21.

A distinction is made between a defense resting upon facts which are misstated, in order to induce a party to enter into a bond, the contents of which he knows ; and one resting on a misrepresentation of the contents of the instrument itself to an illiterate person. In the former case the bond is the obligation of the party who seals it, although it is invalidated by the fraud ; in the latter, it is not his deed or bond at all. *Greene v. North Buffalo Township*, 56 Penn. St. 110 ; *Schuylkill County v. Copley*, 67 id. 386 ; S. C., 5 Am. R. 441 ; see *ante*, 673, 676, art. 3, § 2 ; art. 4, § 1.

§ 5. **Performance of condition.** See *ante*, 680, 694, art. 5, § 5 ; art. 10, § 2. If the condition of a bond be to pay 50*l.* though it is not said of money, yet it must be so intended, and the obligee cannot tender fifty pounds weight of stone. Sid. 151. And the condition of a bond being "to render a fair, just and perfect account, in writing, of all sums received," if the obligor neglect to pay over such sums, it is a breach of the condition. *Bache v. Proctor*, 1 Doug. 382. But a conveyance of a lot by name, "as said to contain 600 acres, be the same more or less," was held to be a performance of the condition of a bond, to convey that lot "containing 600" acres, though the lot fell short 125 acres. *Mann v. Pearson*, 2 Johns. (N. Y.) 37. See *Jackson v. Defendorf*, 1 Caines (N. Y.), 493. In an action upon a bond conditioned that the obligor and his wife should arrange their present difficulty and live together as husband and wife, it was held not a sufficient answer to the action, for the obligor to show that he had made overtures for a reconciliation, which were not successful. *Axtell v. Caldwell*, 24 Penn. St. 88.

As to what will excuse the non-performance of a condition, it may be stated generally, that if a bond or other obligation be upon a condition possible at the time it was made and which afterward became impossible to perform, by the act of God, or of the law, or of the obligee, the condition is saved. *Green v. Smith*, 4 Cold. (Tenn.) 436 ; *People v. Bartlett*, 3 Hill, 570 ; *Bain v. Lyle*, 68 Penn. St. 60 ; *People v. Tubbs*, 37 N. Y. (10 Tiff.) 586, 588 ; *Carpenter v. Stevens*, 12 Wend. 589 ; Co. Litt. 206 *a.* But see *Steele v. Buck*, 61 Ill. 343 ; S. C., 14 Am. R. 60. If a condition consists of two parts, of which one was not possible, at the making of the condition, to be performed, the obligor ought, nevertheless, to perform the other. *Wigley v. Blackwal*,

Cro. Eliz. 780; *Da Costa v. Davis*, 1 Bos. & Pul. 242. But he who prevents the performance of a condition cannot take advantage of its breach or non-performance. *Blandford v. Andrews*, Cro. Eliz. 694; *Franklin Fire Ins. Co. v. Hamill*, 5 Md. 170; *Carrel v. Collins*, 2 Bibb (Ky.), 429. Thus, if the precedent act is to be performed at a certain time or place, and a strict performance of it is prevented by the absence of the party who has a right to claim it, the law will not permit him to set up the non-performance of the condition as a bar to the responsibility which his part of the contract had imposed upon him. *Williams v. Bank of the United States*, 2 Pet. 96, 102. See *ante*, 694, art. 10, § 2.

§ 6. **Discharge by payment, etc.** See *ante*, 694, art. 10, § 1. In general, the lapse of twenty years after a right of action has accrued on a bond is presumptive evidence that such obligation has been discharged. *Jackson v. Hotchkiss*, 6 Cow. 401; *Lyon v. Adde*, 63 Barb. 89; *Central Bank of Troy v. Heydorn*, 48 N. Y. (3 Sick.) 260; *McDowell v. McCullough*, 17 Serg. & R. (Penn.) 51; *Barnett v. Emerson*, 6 T. B. Monr. (Ky.) 607. The presumption arising from lapse of time may, however, be repelled by circumstances explaining satisfactorily why an earlier demand has not been made. *Bailey v. Jackson*, 16 Johns. 210; as for example, the continued absence of the creditor. *Ib.*; or the permanent absence of the debtor. *Shields v. Pringle*, 2 Bibb (Ky.), 387; or the debtor's insolvency. *Levy v. Hampton*, 1 McCord (S. C.), 145; *Boardman v. De Forest*, 5 Conn. 1; or inability to pay. *Blackett v. Wall*, 3 Mann. & Ryl. 119; *Daggett v. Tallman*, 8 Conn. 168; or the near relationship of the parties. *Hillary v. Waller*, 12 Ves. 239, 266. So, the presumption may be rebutted by proof of an admission within twenty years that the debt is due and unpaid. *Cottle v. Payne*, 3 Day (Conn.), 289; *Lyon v. Adde*, 63 Barb. 89; or by proof of payment of interest, which is equivalent to an admission. *McDowell v. McCullough*, 17 Serg. & R. 51. And the indorsement by the obligee on the obligation of a credit for interest, while the obligation was in full force, and before the presumption attached. *Roseboom v. Billington*, 17 Johns. 182; and the indorsement in the handwriting of the obligor, are good evidence to rebut the presumption, whether made before or after the presumption arose. *Boltz v. Bullman*, 1 Yeates (Penn.), 584; *McLean v. McDugald*, 8 Jones' L. (N. C.) 383. See *Houliston v. Smyth*, 2 C. & P. 22; *Livingston v. Arnoux*, 56 N. Y. (11 Sick.) 519; *Grantham v. Canaan*, 38 N.

H. 268; *Searle v. Lord Barrington*, 2 Strange, 826; S. C., 8 Mod. 279; *Rose v. Bryant*, 2 Camp. 321. The presumption of payment after twenty years may, likewise, be repelled by evidence that the obligor had no opportunity or means of paying. *Fladong v. Winter*, 19 Ves. 196.

Where the obligation of a bond is absolved by a rescission of the contract of which it was evidence, an action on the bond may be defended at law. *Moore v. Dial*, 3 Stew. (Ala.) 157. So, a written engagement, by the obligee, not to call on the obligor for money and goods made payable yearly, unless he shall need them for his support, may be pleaded in bar of a suit on the bond. *Filer v. Bissel*, 2 Root (Conn.), 347. And if a bond is paid by a third person, at the request of the obligor, a suit cannot afterward be maintained upon it in the name of the obligee, for the use of the person by whom the payment was made. *Simmons v. Walker*, 18 Ala. 664.

The delivery by the obligee, to a third person, of a bond secured by a trust mortgage, upon the understanding that the third person is to deliver the bond to the obligor, and himself assume the payment of the debt, followed by a delivery of the bond to the obligor by such third person, will, in the absence of fraud, operate a cancellation of the bond and a discharge of the trust. *Piercy v. Piercy*, 5 W. Va. 199.

The emancipation of slaves was held to discharge the next of kin from a refunding bond given by them to the administrator. *Hinton v. Whitehurst*, 68 N. C. 316. See *Henderlite v. Thurman*, 22 Gratt. (Va.) 466.

ARTICLE XIII.

REMEDY ON LOST BOND.

Section 1. In general. Formerly, a court of common law afforded no remedy on a lost bond, for the reason that there could be no *profert* of the instrument, without which the declaration would be fatally defective. But *profert* has been dispensed with, and courts of law now entertain jurisdiction upon an allegation of loss, by time and accident, stated in the declaration. See Co. Litt. 35 b.; *Franceschi v. Marino*, 3 Edw. Ch. 586; *Bromley v. Holland*, 7 Ves. 19, 20; *Totty v. Nesbitt*, 3 T. R. 153, note; *Murlock v. Brown*, 7 Humph. (Tenn.) 61. If the bond is lost after the declaration is filed, it has been held the plaintiff must amend. *Ante*, 163, 164; *Smith v. Woodward*, 4

East, 585; *Chamberlin v. Sawyer*, 19 Ohio, 360. See *Lester v. Governor*, 12 Ala. 624. But, although the liberality of courts of law now dispenses with the necessity of making *profert*, and permits a plaintiff to recover on a lost bond by proving its loss and contents, yet this circumstance does not in the slightest degree change the course in equity. *Kemp v. Pryor*, 7 Ves. 249; *Mayne v. Griswold*, 3 Sandf. (N. Y.) 463, 478; S. C., 9 N. Y. Leg. Obs. 25. And courts of equity will always give relief where the bond has been lost, or when it has been defaced by accident or by design, provided the obligee has been guilty of no misconduct connected therewith. *Harrison v. Turbeville*, 2 Humph. (Tenn.) 242; *Kerney v. Kerney*, 6 Leigh (Va.), 478; *Foster v. Williams*, 5 B. Monr. (Ky.) 197. See a full discussion of this subject under the head of Accident, *ante*, 163, 164.

CHAPTER XXIX.

BOUNDARIES.

TITLE I.

PRIVATE BOUNDARIES

ARTICLE I.

HOW ESTABLISHED BETWEEN INDIVIDUAL PROPRIETORS.

Section 1. Boundary defined. Boundary, in the sense here intended, is defined as "any separation, natural or artificial, which marks the confines or line of two contiguous estates. The term is applied to include the objects placed or existing at the angles of the bounding lines, as well as those which extend along the lines of separation." 1 Bouv. Dict. 218. And where boundaries are denoted by monuments fixed at the angles, the connecting lines are always presumed to be straight, if not otherwise described. *Nelson v. Hall*, 1 McLean, 519; *Kingsland v. Chittenden*, 6 Lans. (N. Y.) 15; S. C. affirmed, 61 N. Y. (16 Sick.) 618; *Allen v. Kingsbury*, 16 Pick. (Mass.) 235, 238; *McCoy v. Galloway*, 3 Ohio, 382; *Jenks v. Morgan*, 6 Gray (Mass.), 448. A natural boundary is a natural object remaining where it was placed by nature. Thus shores, streams and rivers, ponds, beaches, highways and the like, are among the natural objects often referred to as boundaries in deeds. And in North Carolina, a savanna is a "natural boundary," in the sense in which that term is used in the construction of deeds. *Stapleford v. Brinson*, 2 Ired. L. (N. C.) 311. So, one parcel of land itself may be a monument to determine the boundary and limit of another. See *Bates v. Tymason*, 13 Wend. 300; *Flagg v. Thurston*, 13 Pick. 145; *Northrop v. Sumney*, 27 Barb. 196.

An artificial boundary is one erected by man, and monuments denoting such boundary may be referred to in a description in a deed, although they do not exist at the time; provided, that afterward the parties, in good faith and by mutual agreement, put up monuments as and for those intended in the description, in which case, they conclude the parties as effectually as if they

had been in existence when the deed was executed. *Waterman v. Johnson*, 13 Pick. 261, 267; *Lerned v. Morrill*, 2 N. H. 197; *Kennebec Purchase v. Tiffany*, 1 Me. 219. Natural objects, as a rule, being more lasting and permanent than artificial ones, are, on that account, preferred as monuments in forming boundary lines. And in one case it was said that so frail a witness as a stake is scarcely worthy to be called a monument, or to control the construction of a deed. *Cox v. Freedley*, 33 Penn. St. 124.

§ 2. **Public street or highway.** Highways are regarded in our law as *easements*. The public acquire no more than the right of way, with the powers and privileges incident to that right, such as digging the soil and using the timber and other materials found within the space of the road, in a reasonable manner, for the purpose of making and repairing the road and its bridges. When the sovereign imposes a public right of way upon the land of an individual, the title of the former owner is not extinguished; but is so qualified, that it can only be enjoyed, subject to that easement. The former proprietor still retains his exclusive right in all mines, quarries, springs of water, timber, and earth, for every purpose not incompatible with the public right of way. The person in whom the fee of the road is may maintain trespass, or ejectment, or waste. And, when the sovereign chooses to discontinue or abandon the right of way, the entire and exclusive enjoyment reverts to the proprietor of the soil. See, generally, *Harrison v. Parker*, 6 East, 154; *Goodtitle v. Alker*, 1 Burr. 143; *Perley v. Chandler*, 6 Mass. 454; *West Covington v. Freking*, 8 Bush (Ky.), 121; *Mitchell v. Bass*, 33 Tex. 259; *Overman v. May*, 35 Iowa, 89; *Commissioners, etc., v. Beckwith*, 10 Kan. 603; *Cortelyou v. Van Brunt*, 2 Johns. 357; *Ball v. Ball*, 1 Phila. (Penn.) 36. A person through whose lands a highway is laid out may convey the land on each side, retaining the fee of the premises covered by the highway. *Munn v. Worrall*, 53 N. Y. (8 Sick.) 46. And an owner who has thus retained his estate in the soil, incumbered by a highway, has a right to sell it, subject to that incumbrance. *Id.*; *Jackson v. Hathaway*, 15 Johns. 447. See *Peck v. Smith*, 1 Conn. 103; *Graves v. Amoskeag Co.*, 44 N. H. 462. The rule of law seems to be now well settled, both by the English and American authorities, that the proprietors of land bounded "on, upon" or "along" a highway have *prima facie*, at least, a fee in such highway; *ad medium filum viae*,

subject to the easement. See *Berridge v. Ward*, 10 C. B. (N. S.) 400; *Simpson v. Dendy*, 8 id. 433; *Holmes v. Bellingham*, 7 J. Scott (N. S.), 329, 336; *Chatham v. Brainerd*, 11 Conn. 60; *Bucknam v. Bucknam*, 12 Me. 463; *Marsh v. Burt*, 34 Vt. 289; *Dunham v. Williams*, 37 N. Y. (10 Tiff.) 251; *Gove v. White*, 20 Wis. 432; *Rice v. Worcester*, 11 Gray (Mass.), 283; *Banks v. Ogden*, 2 Wall. 57, 68. And where land is sold bordering on a highway, the mere fact that it is not so described in the deed will not vary the construction. The grantee takes the fee to the middle of the highway, on the line of which the land is situated. *Stark v. Coffin*, 105 Mass. 328; *Hawesville v. Lander*, 8 Bush (Ky.), 679; *Gear v. Barnum*, 37 Conn. 229. And the same principles applicable to boundaries on a public road apply also to those on a private road or way. *Smith v. Howden*, 14 C. B. (N. S.) 398; *Holmes v. Bellingham*, 7 id. 328, 336; *Winslow v. King*, 14 Gray (Mass.), 320. But see *State v. Clements*, 32 Me. 279. So, a conveyance bounded upon a street in a city or village would ordinarily include the soil to the center; but when the road-bed belongs to the government and not to the abutters, the deed carries title only to the roadside. *Dunham v. Williams*, 37 N. Y. (10 Tiff.) 251; *Falls v. Reis*, 74 Penn. St. 439; *White v. Godfrey*, 97 Mass. 472; *Bissell v. New York Central R. R. Co.*, 23 N. Y. (9 Smith) 61. See *Seventeenth Street*, 1 Wend. 202; *Grinell v. Kirtland*, 48 How. (N. Y.) 19. And where a deed of land describes it as bounded on a road, and sets forth metes and bounds which plainly exclude the road, no part of the soil and freehold passes by the grant. *Wetmore v. Law*, 22 How. 130; S. C., 34 Barb. 515; *Tyler v. Hammond*, 11 Pick. (Mass.) 193; *Jackson v. Hathaway*, 15 Johns. 447; *Hughes v. Providence, etc., R. R.*, 2 R. I. 508; *Palmer v. Dougherty*, 33 Me. 507; *Cole v. Haynes*, 22 Vt. 558; *Hoboken Land Co. v. Kerrigan*, 30 N. J. (Law) 16. But where a grant described the land as "beginning on the westerly side of the country road; thence running northerly, touching the said westerly side of said road, forty rods;" this description was held to be insufficient to control the rule of law which extends the title to the center of the road. *Johnson v. Anderson*, 18 Me. 76.

A highway referred to in a deed as a boundary must be understood to mean the highway as it practically exists, rather than as it was originally located, in case there has been any change in this respect. *Falls Village, etc., Co. v. Tibbetts*, 31 Conn. 165; *Tibbetts v. Estes*, 52 Me. 566. See *Hunt v. Francis*, 5 Ind. 302.

And where there is no competent record evidence of the laying out of a highway, and its boundaries cannot be accurately ascertained, evidence of the existence of a fence substantially in the same place for more than twenty years, upon the side of the highway, is competent for the purpose of fixing the boundary line. *Pettingill v. Porter*, 3 Allen (Mass.), 349; *Hallenbeck v. Rowley*, 8 id. 475.

§ 3. *Sea shore.* The doctrine of the common law as to what constitutes the shore of the sea is, that it is the space between the ordinary high-water mark and low-water mark. *Cutts v. Hussey*, 15 Me. 237; *Storer v. Freeman*, 6 Mass. 439; *Teschmacher v. Thompson*, 18 Cal. 21; *City of Galveston v. Menard*, 23 Tex. 349; *Martin v. O'Brien*, 34 Miss. 21. The terms "beach," "strand," and "flats," are often used as identical with "shore." *Niles v. Patch*, 13 Gray (Mass.), 254; *East Hampton v. Kirk*, 6 Hun (N. Y.), 257; *Hodge v. Boothby*, 48 Me. 71; *Dana v. Jackson Street Wharf*, 31 Cal. 120. All the shore below ordinary high-water mark belongs to the sovereign power of the State. *Commonwealth v. Charlestown*, 1 Pick. (Mass.) 180; *Trustees of Brookhaven v. Strong*, 60 N. Y. (15 Sick.) 56, 65; *Cortelyou v. Van Brundt*, 2 Johns. 362; *Martin v. Waddell*, 16 Pet. 367. Hence, where lands are described as extending to the sea shore, and are bounded by it, the shore itself will not be considered as falling within the boundaries. *Littlefield v. Maxwell*, 31 Me. 134; *Niles v. Patch*, 13 Gray (Mass.), 257; *Storer v. Freeman*, 6 Mass. 439. But in Massachusetts, the rule of the common law was changed by the colonial ordinance of 1641, and the owner of lands bounded on the sea or salt water may hold to low-water mark, so that he does not hold more than one hundred rods below high-water mark. *Ib.*; *Sale v. Pratt*, 19 Pick. (Mass.) 191. And it is held, that the grant of a wharf may carry the flats in front of it. *Commonwealth v. Alger*, 7 Cush. (Mass.) 66; *Doane v. Broad St. Association*, 6 Mass. 332. See *Palmer v. Hicks*, 6 Johns. 133; *Hodge v. Boothby*, 48 Me. 71; *Lovington v. County of St. Clair*, 64 Ill. 56; S. C., 16 Am. R. 524; *Trustees of Brookhaven v. Strong*, 60 N. Y. (15 Sick.) 56. Whether the ordinance of 1641 extends to New Hampshire has been questioned. See *Nudd v. Hobbs*, 17 N. H. 527. As an incident to the ownership of the flats, sea-weed cast up by the waves upon them or upon the shore, *prima facie*, belongs as an appurtenant to the owner of the soil. *Phillips v. Rhodes*, 7 Metc. (Mass.) 322; *East Hampton v.*

Kirk, 6 Hun (N. Y.), 257, 260. And the right to take it may be the subject of sale and conveyance, separate from the soil itself. *Hill v. Lord*, 48 Me. 83, 95.

It has often been decided that the holders of land hold to low-water mark, notwithstanding they are bounded "by stakes and stones on the bank of the river." See *Hart v. Hill*, 1 Whart. (Penn.) 131; *Elder v. Burns*, 6 Humph. (Tenn.) 358; *Hogan v. McMurtry*, 5 Dana (Ky.), 181; 2 Smith's Lead. Cas. 166 (218).

§. 4 **Lakes or rivers.** The bank of a stream is the continuous margin where vegetation ceases; and the *shore* is the pebbly, sandy, or rocky space between that and low-water mark. *McCullough v. Wainright*, 14 Penn. St. 171. The well-established rule of law is, that where lands are bounded by a stream or river not navigable, or above tide-water, the grantee takes *usque flum aquæ*, unless the stream or river is expressly excluded from the grant by the terms of the deed. *Kingsland v. Chittenden*, 6 Lans. (N. Y.) 15; *Demeyer v. Legg*, 18 Barb. 14; *Camden v. Creel*, 4 W. Va. 365; *State v. Gilmanton*, 9 N. H. 461; *Hatch v. Dwight*, 17 Mass. 239, 298; *Railroad Company v. Schurmeir*, 7 Wall. 272, 287; *Arnold v. Elmore*, 16 Wis. 509. See *Thomas v. Hatch*, 3 Sumn. 170. Thus, as illustrations of the rule as stated, it has been held, that where the line ran "to a stake standing on the east bank, etc., thence down the river, etc., it extended to the thread of the river. *Luce v. Carley*, 24 Wend. 451. And see *Lunt v. Holland*, 14 Mass. 150. So where the boundary was described as "easterly on a creek, and down said creek to a small butternut tree, which is the north-east corner of said lot," it was held that the true corner was at the center of the stream opposite this tree. *Newton v. Eddy*, 23 Vt. 319. See also *Cold Springs Iron Works v. Tollard*, 9 Cush. (Mass.) 492; *Brown v. Chadbourne*, 31 Me. 9. But a line running to G. river, thence "along the shore of said river to," etc., was held to exclude the river. *Child v. Starr*, 4 Hill (N. Y.), 369. See *Yates v. Van De Bogert*, 56 N. Y. (11 Sick.) 526, 531; *Bradford v. Cressey*, 45 Me. 9. And where one corner was a stake, etc., on the west bank of the river, and then around to another stake on the same bank, "thence running on the western bank of said river to high water to the first bound," the river was held to be excluded. *Dunlap v. Stetson*, 4 Mason, 349. The boundary line to lands bordering on rivers and lakes follows the meandering of the stream, and when the length of it is given, it is ascertained by reducing the meandering lines to a straight one. *Gran-*

ger v. Swart, 1 Woolw. 88; *Calk v. Stribbing*, 1 Bibb (Ky.), 122; *Hicks v. Coleman*, 25 Cal. 142.

It has been held that where lands are bounded in a deed of conveyance, by an inland lake, five miles long, but less than a mile in width, that the title of the grantee extends *usque ad medium flum aquæ*. *Ledyard v. Ten Eyck*, 36 Barb. 102. But generally this rule is inapplicable to the lakes and other large natural collections of fresh water in this country. See *Hathorn v. Stinson*, 10 Me. 238; *Canal Commissioners, etc. v. People*, 5 Wend. 423. In New Hampshire it was held that where a grant runs to, and is bounded upon a lake or large body of standing fresh water, the grant extends only to the water's edge. *State v. Gilmanton*, 9 N. H. 481. And see *Dillingham v. Smith*, 3 Me. 370; *Fletcher v. Phelps*, 28 Vt. 257. Riparian owners on Lake Michigan own to the line where the water usually stands when unaffected by any disturbing cause. *Seaman v. Smith*, 24 Ill. 521. Proprietors of land lying on Lake Champlain own to low-water mark, unless it is otherwise expressed in the grants; subject, however, to a servitude to the public, for the purposes of navigation, up to high-water mark. *Champlain & St. Lawrence R. R. Co. v. Valentine*, 19 Barb. 484. And it is stated to be a general rule, that a boundary upon a natural pond or lake carries title, not to its center, but only to low-water mark. *Wheeler v. Spinola*, 54 N. Y. (9 Sick.) 377; *Waterman v. Johnson*, 13 Pick. (Mass.) 261. But the rule as to an artificial pond is otherwise; a boundary thereon generally, in the absence of other controlling facts, carries title to the center. *Id.*; *West Roxbury v. Stoddard*, 7 Allen (Mass.), 167; *Wood v. Kelley*, 30 Me. 47. It has been held by the Supreme Court of the United States, that the riparian owner on the great lakes, as well as on tide-waters, has, by grant, statute, or immemorial usage, the right to build out such convenient wharves as do not obstruct the public rights of navigation. *Dutton v. Strong*, 1 Black, 23.

The rule which governs the question of boundary in the case of land bordering on the sea, or on an arm of the sea, is also applicable to land bounding on a navigable river. And the general rule of the common law is that if the boundary be a navigable river, that is, one in which the tide ebbs and flows, the land extends only to ordinary high-water mark, and high-water mark is *prima facie* the boundary line. *Middleton v. Pritchard*, 3 Scam. (Ill.) 510; *State v. Jersey City*, 1 Dutch. (N. J.) 525; *East Haven v. Hemingway*, 7 Conn. 186; *Canal Commissioners*

v. *The People*, 5 Wend. 423, 446; *Wheeler v. Spinola*, 54 N. Y. (9 Sick.) 377, 385.

§ 5. **Other boundaries.** A tree, standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not. *Hoffman v. Armstrong*, 46 Barb. 337, 339; 48 N. Y. (3 Sick.) 201; *Griffin v. Bixby*, 12 N. H. 454; and trespass will lie, if one cuts and destroys it without the consent of the other. *Ib.*; *Dubois v. Beaver*, 25 N. Y. (11 Smith) 123. But see *Gibson v. Vaughn*, 2 Bailey (S. C.), 389. Where the boundary line between two adjoining proprietors is a ditch or wall, and one of the owners conveys land bounding it in the conveyance, upon the ditch or wall, the presumption is, that the grantee takes to the center, as in the case of land conveyed, bounded on an un-navigable river, or a highway. *Warner v. Southworth*, 6 Conn. 471; *City of Boston v. Richardson*, 13 Allen (Mass.), 146. In case of a boundary on party walls, the presumption is, that the wall and the land upon which it stands belong in common to the owners of the adjoining premises. *Cubitt v. Porter*, 8 Barn. & C. 257; *Hoffman v. Armstrong*, 46 Barb. 337, 339; 48 N. Y. (3 Sick.) 201. The common boundary is the property of both, and where a fixture is put on it by the labor of both, they are, as to it, tenants in common. *Ib.* Thus, a fence erected on the line is a fixture, in which the adjoining owners have an undivided interest; *Gibson v. Vaughn*, 2 Bailey (S. C.), 389; and for the removal of which it is held, that neither can maintain trespass against the other. *Ib.* But see *Dubois v. Beaver*, 25 N. Y. (11 Smith) 123; *Griffin v. Bixby*, 12 N. H. 454.

As to the ownership of islands formed in rivers the rule is stated to be, that where an island is so formed in the bed of a river not navigable, as to divide the channel and lie partly on each side of the thread of the river, it will be divided between the riparian proprietors on the opposite sides of the river according to the original thread of the river. *Inhabitants of Deerfield v. Arms*, 17 Pick. (Mass.) 41; *Trustees, etc., v. Dickinson*, 9 Cush. (Mass.) 548. See also *Bardwell v. Ames*, 22 Pick. 333; *McCullough v. Wall*, 4 Rich. (S. C.) 68; *Crooker v. Bragg*, 10 Wend. 260.

§ 6. **Marshaling boundaries.** In locating lands, boundaries are usually marshaled in the following order: *First.* Natural boundaries. *Second.* Artificial marks. *Third.* Adjacent boundaries. *Fourth.* Course and distance. *Fulwood v. Graham*, 1

Rich. (S. C.) 491. Neither rule, however, occupies an inflexible position; for when it is plain that there is a mistake, an inferior means of location may control a higher. *Ib.*; *Loring v. Norton*, 8 Me. 61; *Haynes v. Young*, 38 id. 557; *Newhall v. Ireson*, 8 Cush. (Mass.) 595; *Nelson v. Hall*, 1 McLean, 518.

§ 7. Construction of grants in respect to boundary. In giving construction to the description of the premises in a deed, the intent of the parties, if by any possibility it can be gathered from the language employed, will be effectuated. A general rule of construction as it regards boundary, and one that is well sustained by the authorities, is thus stated: Whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title in the land of which it has been made a part, as a house, a wall, a wharf or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but where the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in the case of a way, a river, a ditch, a wall, a fence, a tree or a stake, the center of the thing so running over or standing on the land is the line of boundary of the lot granted. *City of Boston v. Richardson*, 13 Allen (Mass.), 144, 157. And see *Lord v. Commissioners of Sidney*, 12 Moore's P. C. C. 473, 497; S. C., 7 W. R. 267; see, also, the preceding sections of this article and the cases cited.

Where the boundaries of land are fixed, known and unquestionable monuments, although neither courses, nor distances, nor the computed contents correspond, the monuments must govern. *Pernam v. Weed*, 6 Mass. 131; *Alshire v. Hulse*, 5 Ohio, 534; *Smith v. Dodge*, 2 N. H. 303; *Jackson v. Frost*, 5 Cow. 346; *Yates v. Van De Bogert*, 56 N. Y. (11 Sick.) 526; *Baxter v. Everett*, 7 T. B. Monr. (Ky.) 333; *Call v. Barker*, 12 Me. 325; *Dogan v. Seekright*, 4 Hen. & M. (Va.) 125; *Frederick v. Brulard*, 7 La. Ann. 655; *West v. Shaw*, 67 N. C. 489; *Welder v. Hunt*, 34 Tex. 44; *Preston v. Bowmar*, 6 Wheat. 580; *Riley v. Griffin*, 16 Ga. 141; *Moreland v. Page*, 2 Iowa, 139; *Keenan v. Cavanaugh*, 44 Vt. 268. If there are no monuments, the land must be bounded by the courses and distances named in the patent or deed. *Hammond v. Ridgley*, 5 Harr. & J. (Md.) 254; *Cherry*

v. *Slade*, 8 Murph. (N. C.) 82; *Chinoweth v. Haskell*, 3 Pet. 96; *Drew v. Swift*, 46 N. Y. (1 Sick.) 204. And the same is true, where monuments that once existed are gone, and their places cannot be proved. *Preston v. Bowmar*, 2 Bibb (Ky.), 493; *Bagley v. Morrill*, 46 Vt. 94. Or where monuments are named, but are indistinguishable from others of the same kind. *Chinoweth v. Haskell*, 3 Pet. 96; *Browning v. Atkinson*, 37 Tex. 633. The reason given why monuments are to control the courses and distances in a deed is, that the former are less liable to mistakes. *Davis v. Rainsford*, 17 Mass. 210. Or, the rule is based upon the legal presumption, that all grants and conveyances are made with reference to an actual view of the premises by the parties thereto. *Raynor v. Timerson*, 46 Barb. 518. See *Smith v. Chatham*, 14 Tex. 322; *Harvey v. Mitchell*, 11 Fost. (N. H.) 575. Where certain monuments are referred to in a description, which do not exist at the time, and afterward the parties, in good faith and by mutual agreement, put up monuments as and for those intended in the description, such monuments will be deemed the monuments intended in the description. But the placing of these monuments and the consent and agreement of the parties in relation thereto must be proved by parol. *Waterman v. Johnson*, 13 Pick. (Mass.) 261, 267. So it is competent to show by parol evidence, that certain monuments actually existing at the time were the monuments intended, where there are two or more which equally well answer the description. Thus, if the deed describes a line as running to a pine tree marked, and in applying the deed to the land, there are found two pine trees marked, either of which answers the general description, parol evidence would be admissible to show which was intended. *Ib.* And see *Frost v. Spaulding*, 19 Pick. 445, 447; *Cotton v. Seavey*, 22 Cal. 496; *Middleton v. Perry*, 2 Bay (S. C.), 539. The question as to *what* the boundaries of a given piece of land which has been conveyed by deed are, is for the court; *where* these boundaries are, is a question for the jury. *Abbott v. Abbott*, 51 Me. 575, 581; *Clark v. Wagoner*, 70 N. C. 706.

Some miscellaneous illustrations of construction as to boundary are here given. Where the calls in a conveyance of land are for two corners at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise. *Lovington v. County of St. Clair*,

18 Wall. 628; 16 Am. R. 524, *note*; affirming S. C., 64 Ill. 56; 16 Am. R. 516. Where a deed described the premises conveyed as bounded by a line beginning at a point "on the bank" of a stream, thence going by courses and distances around the track "to the said stream, and down the stream as it winds and turns, to the place of beginning;" it was held that the words "to the said stream" must be construed to mean to the bank of the stream, and not to the center. *Babcock v. Utter*, 1 Abb. Ct. App. (N. Y.) 27. A grant bounding on "the bank" of a creek does not convey the land to the center of the creek, but only to low-water mark. *Halsey v. McCormick*, 13 N. Y. (3 Kern.) 296; *Yates v. Van DeBogert*, 56 N. Y. (11 Sick.) 526. See also *Lamb v. Ricketts*, 11 Ohio, 311; *McCulloch v. Aten*, 2 id. 309. A deed which calls for "the middle of a creek in its natural channel when the pond is exhausted," makes a shifting boundary, and not a fixed land-mark. *Primm v. Walker*, 38 Mo. 94. A grant of "all that certain stream and pond of water and saw-mill thereon to belonging, situate," etc., does not convey to the grantee the fee of the land covered by the stream and pond. *Nostrand v. Durland*, 21 Barb. 478. And see *Bartholomew v. Edwards*, 1 Houst. (Del.) 17. The owner of adjoining lands, who is also owner of the bed of a creek, may grant and convey the bed of the creek separate from the land which bounds it. *Den v. Wright*, Pet. (C. C.) 64. A deed of land describing the granted premises as "lying and being on the west side" of a river, which is not navigable, conveys the title to an island in the river, which lies to the west of the main channel. *Stanford v. Mangin*, 30 Ga. 355. And a deed of land bounded "east by the pond," conveys the land to the center of the original stream of an artificial pond, which was created by a dam across the stream. *Mill River, etc., Co. v. Smith*, 34 Conn. 462. A call "up the creek" means, ordinarily, a line to run with the creek. *Buckley v. Blackwell*, 10 Ohio, 508. And the line must run through the middle of the creek, according to its turnings and windings. *Jackson v. Louw*, 12 Johns. 252; *Jones v. Pettibone*, 2 Wis. 308.

The rule that a grant of land, bounded on a road or creek, carries the rights of the grantee to the center thereof, applies as well to city lots as to farms in the country. *Hammond v. McLaughlin*, 1 Sandf. (N. Y.) 323. The question, whether, in conveyance of land abutting upon a highway, the highway does or does not pass to the grantee, is, in all cases, a matter of construction and intention merely, to be determined from a consideration of the

language used by the parties and such surrounding circumstances as are proper to be considered in ascertaining their intent. The presumption in such cases is, however, that the parties did intend to include the highway, and the burden of proof is upon the party who asserts that the contrary was intended. *Buck v. Squires*, 22 Vt. 484; *Kingsland v. Chittenden*, 6 Lans. (N. Y.) 15; 61 N. Y. (16 Sick.) 618. If a deed of land bounds the grantee, upon or by "the side of a highway," these words are presumed to exclude the highway, especially if this construction be consistent with the circumstances and subject-matter of the grant. *Anderson v. James*, 4 Robt. (N. Y.) 35; *Fearing v. Irwin*, 4 Daly (N. Y.), 385; 55 N. Y. (10 Sick.) 486; *Hughes v. Providence, etc., R. R. Co.*, 2 R. I. 508; *Hoboken Land, etc., Co. v. Kerigan*, 17 N. J. Eq. 13.

A conveyance of land "bounded on" a private way leading to the grantor's dwelling-house carries the fee to the center of the way. *Fisher v. Smith*, 9 Gray (Mass.), 441. But, where the proprietor of grounds laid out for use as a public cemetery makes a conveyance of a burial lot, no interest in the alleys which separate it from other lots, except a right of way, passes to the purchaser, unless particularly expressed in the deed; the presumption being of a reservation, rather than a grant. *Seymour v. Page*, 33 Conn. 61.

It has been held by the supreme court of the State of Maine, that the line of a parcel of land to run parallel with and at a specified distance from the south side of a building should be measured from the corner board of that side, and not from the outer edge of the eaves. *Proprietors, etc. v. Machias Hotel Company*, 51 Me. 413. And by the same court it is held, that the word "from" an object, or "to" an object, used in a deed excludes the terminus referred to. *Bonney v. Morrill*, 52 id. 252.

Where the question involved is, whether a boundary described in a deed was intended to be a mere paper street, as laid down on plat, or an actual highway, known as such, and not by any name appearing on the plat, the use of the expression "public road" as that boundary in the description in the deed, is construed to indicate the latter rather than the former; and indicates an intent to carry the title to the middle of the road. *Purkiss v. Benson*, 28 Mich. 538.

§ 8. Effect of acquiescence in boundary line. A line may be established, by acquiescence of the parties, that is different from

the true line. *Smith v. McAllister*, 14 Barb. 434; *Taught v. Holway*, 50 Me. 24; *Davis v. Judge*, 46 Vt. 655. And the following periods of time of acquiescence have been held sufficient to fix the boundaries: Fifteen years, *Spaulding v. Warren*, 25 Vt. 316; *Davis v. Judge*, 46 id. 655; sixteen years, *Columbet v. Pachees*, 48 Cal. 395; twenty years, *Corning v. Troy Iron and Nail Factory*, 44 N. Y. (5 Hand) 577; *Minor v. Mayor, etc., of New York*, 5 Jones & Sp. 171; *Ball v. Cox*, 7 Ind. 453; *Carroway v. Chacey*, 2 Jones' L. (N. C.) 170; *Coyle v. Cleary*, 116 Mass. 208; twenty-five years, *Savage v. Foy*, 7 La. Ann. 573; thirty years, *Chew v. Morton*, 10 Watts (Penn.), 321; forty years, *Baldwin v. Brown*, 16 N. Y. (2 Smith) 359; *Pierson v. Mosher*, 30 Barb. 81. And see *Terry v. Chandler*, id. 354; *Gilchrist v. M'Gee*, 9 Yerg. (Tenn.) 455; *Bolton v. Lann*, 16 Tex. 96; *Ratcliffe v. Cary*, 4 Abb. Ct. App. (N. Y.) 4; *Prim v. Raboteau*, 56 Mo. 407; *Smith v. McNamara*, 4 Lans. (N. Y.) 169; *McArthur v. Henry*, 35 Tex. 801; *Hathaway v. Evans*, 108 Mass. 267.

Where the channel of a river is the boundary between States, the sudden changing of it by artificial means does not affect the boundary; nor can State boundaries be changed by the acquiescence of towns, or town authorities. *State v. Young*, 46 Vt. 565.

§ 9. **Special agreements as to boundary line.** It is a well-settled doctrine that the courts will not disturb parol agreement or long acquiescence in a boundary line, but will encourage such settlements of disputed, conflicting, or doubtful boundaries, as a means of suppressing spiteful and vexatious litigation. *Wakefield v. Ross*, 5 Mass. 16; *McArthur v. Henry*, 35 Tex. 801. Such agreements are not within the statute of frauds, requiring agreements in relation to real estate to be in writing. *Kincaid v. Dormey*, 47 Mo. 337; *Kellum v. Smith*, 65 Penn. St. 86; *Orr v. Hadley*, 36 N. H. 575. And the doctrine is held to apply even where one of the parties is only a settler upon public land. Thus, a proprietor who points out to a settler on land adjoining his own, a line as the true boundary, acquiescing and assisting him in a settlement and improvements thereon, is thereby estopped from afterward asserting his claim to the land covered by the improvements, though a subsequent survey proved it to be his own land. *Jordan v. Deaton*, 23 Ark. 704. So, it is held, that where there has been an honest difficulty in determining the lines between two neighboring proprietors, and they have actually agreed by parol upon a certain boundary as the true one, and have occupied accordingly with visible monuments or divisions, the agreement

long acquiesced in will not be disturbed, although the time has not been sufficient to establish an adverse possession. *Smith v. Hamilton*, 20 Mich. 433. See *Corning v. Troy, etc., Factory*, 44 N. Y. (5 Hand) 577; *Reed v. McCourt*, 41 N. Y. (2 Hand) 435. And even without any agreement more than is implied from their acts, if two persons trace their dividing line, and both recognizing it as such, one goes forward with the knowledge and acquiescence of the other, and makes valuable improvements, so valuable as to work great injury to the party making them if the line be disturbed, the other will be estopped from afterward alleging such mistake as shall deprive the builder of his improvements. *Dolde v. Vodicka*, 49 Mo. 98; *Majors v. Rice*, 57 id. 384. See also *Palmer v. Anderson*, 63 N. C. 365; *Abbott v. Abbott*, 51 Me. 575; *Laverty v. Moore*, 32 Barb. 347; *Wilson v. Hudson*, 8 Yerg. (Tenn.) 398; *Boyd v. Graves* 4 Wheat. 513. So, where a person has sold land up to a certain line, pointing it out as the true line, and inducing another to buy up to it, he is estopped to deny that it is the line between his own and the adjoining land. *Richardson v. Chickering*, 41 N. H. 380. But a parol agreement respecting a boundary, made while a party is only an occupant without title, cannot be binding upon him after he acquires the fee. *Crowell v. Maughs*, 7 Ill. 419; *Lewallen v. Overton*, 9 Humph. (Tenn.) 76.

And a bare trespasser, having no title whatever, cannot, by such agreement, become the owner of his neighbor's land; nor can there be a plain and wide departure from the boundary of a natural object, like a marsh, under the pretext of fixing the boundary. *Walker v. Devlin*, 2 Ohio St. 593. So, in a division of land between two parties, if either was deceived by the innocent or fraudulent misrepresentations of the other; or there was any mistake in regard to their rights, the division is not binding on either. *Knowlton v. Smith*, 36 Mo. 507; *Bailey v. Jones*, 14 Ga. 384; *Colby v. Norton*, 19 Me. 412; *Coon v. Smith*, 29 N. Y. (2 Tiff.) 392. And if the parties know where the true line is, and by agreement make another, this would be a parol transfer of the land, and would be void by the statute of frauds. *Yarborough v. Abernathy*, 1 Meigs (Tenn.), 413. See *Whitney v. Holmes*, 15 Mass. 153; *Gove v. Richardson*, 4 Me. 327.

The admission of a party of a mistaken boundary line, for a true one, has no effect upon his title. *Crowell v. Bebee*, 10 Vt. 33. And it is held, that a parol assent by one of them, as to the location of a boundary fence between adjoining owners, and the

actual erection of the fence by the other, in accordance with such assent, followed by mutual occupation and acquiescence in such location of the boundary for a few months, is not sufficient to change the true line, or to preclude the assenting party from asserting his rights, in accordance with such true line. *Reed v. McCourt*, 41 N. Y. (2 Hand) 435. And see *Miner v. Mayor, etc., of New York*, 5 Jones & Sp. (N. Y.) 171, 189. Nor will parties be bound by an intervening fence as a boundary dividing their lands, where they claim only to the extent of their paper title, whatever that may be, and the fence is suffered to remain simply as a matter of convenience. *West v. St. Louis K. C. & N. Railway Co.*, 59 Mo. 510. See *Jones v. Smith*, 3 Hun (N. Y.), 351; S. C., 5 N. Y. S. C. (T. & C.) 490.

§ 10. **Settlement of disputed boundaries.** The mode of proceeding in the settlement of disputed boundary lines is, in some cases, prescribed by statute; and special tribunals have been provided, for the express purpose of ascertaining and determining the line or lines in dispute. See *Lisbon v. Bowdoin*, 53 Me. 324; *Pitman v. Albany*, 34 N. H. 577; *Perry v. Pratt*, 31 Conn. 433; *Norris' Appeal*, 64 Penn. St. 275. But in the great majority of cases, disputes respecting boundary lines between adjoining owners of lands are settled in the action of ejectment or the action for the recovery of real property. So, the action for trespass upon lands not unfrequently turns upon the question of boundary. See *Goodridge v. Dustin*, 5 Metc. (Mass.) 363; *Palmer v. Anderson*, 63 N. C. 365. There are cases of disputed boundary, however, for which there is no adequate remedy except in a court of equity. But equity has no jurisdiction to fix the boundaries of legal estates in the absence of other ground for equitable relief. *Norris' Appeal*, 64 Penn. St. 275; *Wetherbee v. Dunn*, 36 Cal. 249. To give jurisdiction there must be some equity superinduced by the acts of the parties. *Tillmes v. Marsh*, 67 Penn. St. 507. And see *Stewart v. Coulter*, 4 Rand. (Va.) 74; *Haskell v. Allen*, 23 Me. 448; *Perry v. Pratt*, 31 Conn. 433. Where, however, there are peculiar equities attaching themselves to the controversy, or where it will prevent a multiplicity of suits, a court of equity will assume jurisdiction and grant an appropriate remedy. *Boyd v. Dowie*, 65 Barb. 237; *Wetherbee v. Dunn*, 36 Cal. 249, 255. Thus, where a defendant has threatened and has served a formal written notice that he intends to remove ten inches of the end wall of the complainant's dwelling, which the defendant alleges

is upon his land, a court of equity will, to prevent multiplicity of suits, entertain jurisdiction and settle the boundaries, in order to determine whether the complainant is entitled to the continuance of its protection by injunction. *De Veney v. Gallagher*, 20 N. J. Eq. 33. And see *Primm v. Raboteau*, 56 Mo. 407, in which case it is held that where a court of equity grants relief in response to the prayer of a pleading in the nature of a bill of peace, it may effectuate its decree in their behalf, by requiring a disputed boundary to be surveyed and marked in a permanent manner. And where a mill-race was conveyed, and afterward filled up and plowed over by one who had acquired an interest in the land, a court of equity took jurisdiction and granted relief "under a well-settled head of equity jurisdiction — Confusion of boundaries." *Merriman v. Russell*, 2 Jones' Eq. (N. C.) 470. So it would seem that equity may enforce an oral agreement to fix boundary. *Jamison v. Petit*, 6 Bush (Ky.), 669

CHAPTER XXX.

BREACH OF MARRIAGE PROMISE.

ARTICLE I.

AS TO RIGHT OF ACTION FOR BREACH OF PROMISE TO MARRY.

Section 1. Nature of contract to marry. Contracts to marry are unlike all other contracts. They concern the highest interests of human life, and enlist the tenderest sympathies of the human heart, and the acts and declarations done and employed by parties in negotiating them are often correspondingly delicate and emotional. No formal language is necessary to constitute the contract. If the conduct and declarations of the parties clearly indicate that they regard themselves as engaged, it is not material by what means they arrived at that state. Such is the well-established doctrine, both in England and in this country. See *Whitcomb v. Wolcott*, 21 Vt. 368; *Hotchkins v. Hodge*, 38 Barb. 117; *Tefft v. Marsh*, 1 W. Va. 38; *Coil v. Wallace*, 24 N. J. (Law) 291; *Perkins v. Hersey*, 1 R. I. 493; *Waters v. Bristol*, 26 Conn. 398; *Hutton v. Mansell*, 6 Mod. 172; *Honeyman v. Campbell*, 5 Wils. & Shaw, 144; S. C., 2 Dow. & Clark, 282. In the last-mentioned case, the following propositions are stated to be the law upon the subject:

First. That the contract may be proved by direct or by circumstantial evidence.

Second. That there must be a serious promise, intended as such by the person making it, and accepted by the person to whom it was made.

Third. That mere courtship or even an intention to marry is not sufficient to constitute a contract of marriage. Approved in *Homan v. Earle*, 53 N. Y. (8 Sick.) 267, 273.

The expression used in many of the cases, that a contract may be inferred from devoted attention and apparently exclusive attachment, has not been generally adopted by the courts. *Ib.*; *Wightman v. Coates*, 15 Mass. 1, *note*; *Commonwealth v. Walton*, 2 Brewst. (Penn.) 487. It does not follow that because a man is the suitor of a lady and visits her frequently, a marriage engagement exists. *Walmsley v. Robinson*, 63 Ill. 41; S. C.,

14 Am. R. 111; *Burnham v. Cornwell*, 16 B. Monr. (Ky.) 284. Nevertheless, courtship is a most material fact in the case in examining whether from the conduct of the parties it appears that a promise had actually passed between them. *Honeyman v. Campbell*, 5 Wils. & Shaw, 144; S. C., 2 Dow. & Clark, 282. So, while it is plain that an intention to make a contract is not a contract, yet if such intention is so expressed as that both parties understand it to be a promise, and it is accepted as such, it is as binding as if made in any other form. *Homan v. Earle*, 53 N. Y. (8 Sick.) 267, 274; *Harvey v. Johnston*, 6 C. B. 295; 6 D. & L. 120; 12 Jur. 981; 17 L. J., C. P. 298.

Contracts to marry at a future time were once regarded with disfavor by the English courts. See *Lowe v. Peers*, 4 Burr. 2225, 2230; *Woodhouse v. Shepley*, 2 Atk. 535, 539. But it has long been the settled law both in England and in this country, that such contracts are as valid and effectual as any other contracts; and actions may be maintained upon them, and damages may be recovered as well for suffering and injury to condition and prospects, as for pecuniary loss. See *Daniel v. Bowles*, 2 C. & P. 553; *Morgan v. Yarborough*, 5 La. Ann. 317; *Boynton v. Kellogg*, 3 Mass. 189; *Lawrence v. Cooke*, 56 Me. 187.

§ 2. Promises must be reciprocal. Promises to marry must be reciprocal, or no action can be maintained for breach of promise. *Espy v. Jones*, 1 Ala. 454; *Standiford v. Gentry*, 32 Mo. 477; *Allard v. Smith*, 2 Metc. (Ky.) 297; *Weaver v. Bachert*, 2 Penn. St. 80. But it is not necessary that assent to the engagement by both parties be concurrent. If an offer be made, it remains open for acceptance for a reasonable time, and after acceptance the contract is complete. *Veneall v. Veness*, 4 F. & F. 344. An exception to the rule as to the necessity of reciprocity would seem to exist where the promise to marry is made by deed. Thus, if a man of full age binds himself by deed to marry a woman by a day named, he is responsible for the non-performance of his bond or covenant, although the woman may not be bound by a reciprocal contract to marry him. *Atkins v. Farr*, 1 Atk. 287. It is the duty of the man, in such case, to go and offer himself to the woman, and not for the woman to go in search of the man. *Holcroft v. Dickenson*, 1 Freem. 347; *Seymour v. Gartside*, 2 D. & R. 57. A woman is also bound by such a deed or covenant as well as a man, provided it has been obtained openly and fairly, and with perfect good faith. But such a contract or engagement obtained from a woman will be

regarded with the greatest jealousy and suspicion, particularly where the man has entered into no corresponding engagement on his part. *Cock v. Richards*, 10 Ves. 437. Where the defendant's promise is proved, the woman may prove her own acts and declarations in order to show her assent. *Wetmore v. Wells*, 1 Ohio St. 26; *Moritz v. Melhorn*, 13 Penn. St. 331.

§ 3. **Conditional promises.** A contract to marry, like most other contracts, may be on condition; and if the condition is a lawful one, the liability attaches as soon as the condition has been accomplished. *Cole v. Cottingham*, 8 C. & P. 75; *Harvey v. Johnston*, 6 C. B. 295; 6 D. & L. 120; 12 Jur. 981; 17 L. J., C. P. 298. But the condition may be such as to make the contract void. Thus, if the marriage is made to depend upon the happening of a distant and uncertain event, which may, in all probability, not take place during the lives of the parties, it would be a contract in restraint of marriage, and void. *Hartley v. Rice*, 10 East, 22. So, marriage brokerage bonds, as they are called, are held invalid, as against public policy. These are contracts to marry at the death of parents or other relations from whom money is expected, and who are kept in ignorance of the contract. *Drury v. Hooke*, 1 Vern. 412; *Cole v. Cottingham*, 8 C. & P. 75. But a covenant to pay a woman a sum of money, so long as she continues sole and unmarried, is not illegal. *Gibson v. Dickie*, 3 M. & S. 463.

§ 4. **Time of performance.** An agreement to marry at an unreasonably distant time is voidable at the option of either party, as being in restraint of matrimony. See *Hartley v. Rice*, 10 East, 24. If no time is specified for the performance of the contract, it is in contemplation of law a contract to marry within a reasonable time after request; and either party may call upon the other to fulfill the engagement, and, in case of default, may bring an action for damages. So, if a day is fixed and agreed upon for the performance of the contract, and, before that day arrives, either party refuses to perform the contract at any time, such party is instantly liable in an action for damages for breach of promise. *Burtis v. Thompson*, 42 N. Y. (3 Hand) 246; S. C., 1 Am. R. 516; *Holloway v. Griffith*, 32 Iowa, 409; S. C., 7 Am. R. 208; *Frost v. Knight*, L. R., 7 Ex. 218; S. C., 5 Alb. L. J. 235; reversing S. C., L. R., 5 Ex. 322. And if either of the parties puts it out of his or her power to fulfill the contract, by marrying somebody else, there is a breach of the engagement; and a right of action at once attaches. A request to marry, in such case, need not be

made or alleged in the pleadings. *Short v. Stone*, 8 Q. B. 358; *Lovelock v. Franklyn*, 8 id. 378; S. C., 15 L. J., Q. B. 145; *Clements v. Moore*, 11 Ala. 35; *King v. Kersey*, 2 Ind. 402.

§ 5. **Validity of promise.** A promise of marriage made at a time when both parties were married, and known to be so by each other, is held invalid. *Paddock v. Robinson*, 63 Ill. 99; S. C., 14 Am. R. 112. But, it is held that an action may be maintained for the breach of a promise to marry, although the defendant was married at the time the promise was made, provided the plaintiff was ignorant thereof. *Kelly v. Riley*, 106 Mass. 339; S. C., 8 Am. R. 336; *Cover v. Davenport*, 1 Heisk. (Tenn.) 368; S. C., 2 Am. R. 706; *Wild v. Harris*, 18 L. J., C. P. 297; 7 C. B. 999.

A promise to marry, made in consideration of illicit intercourse, is not binding. *Goodall v. Thurman*, 1 Head (Tenn.), 209; *Beaumont v. Reeve*, 8 Ad. & Ell. (N. S.) 483; *Steinfeld v. Levy*, 16 Abb. N. S. (N. Y.) 26; though it has been held, that a promise of marriage, made after seduction has been effected and in consequence thereof, is not thereby rendered invalid. *Hotchkins v. Hodge*, 38 Barb. 117. See *People v. Kenyon*, 5 Park. (N. Y.) 254.

An unwritten promise to marry after more than a year is void within that clause of the Statute of Frauds which requires that a promise not to be performed within one year from the making shall be in writing. *Derby v. Phelps*, 2 N. H. 515; *Nichols v. Weaver*, 7 Kans. 373. But where the defendant told the plaintiff he was not able to marry her then, but promised her he would marry her within four years; and it not appearing that the parties understood that the promise was not to be performed within one year, it was held, that such promise was not within the Statute of Frauds. *Lawrence v. Cooke*, 56 Me. 187. Mutual promises to marry are sometimes excepted from the operation of the Statute of Frauds. 2 N. Y. R. S. 140, § 2, subd. 3, Edm. ed.

§ 6. **Excuses for breach of promise.** It is a sufficient excuse for the breach of a woman's promise to marry, if the person to whom she has given the promise turns out upon inquiry to be a man of bad character. *Baddely v. Mortlock*, Holt, 151. So, notwithstanding a promise of marriage proved, if a man has conducted himself in a brutal or violent manner, and threatened to use a woman ill, she has a right to say she will not commit her happiness to such keeping. *Leeds v. Cook*, 4 Esp. 257. Bodily infirmity, arising after the contract, has been held a good reason for either of the parties to break off an engagement. *Atchinson v. Baker*, Peake's Add. Cas. 103; *Short v. Stone*, 8 Q. B. 369.

But it has also been held by a majority of the court, in an English case, that a party cannot set up as an excuse for the breach of a promise to marry, that the performance of the conjugal duties would be dangerous to his life. *Hall v. Wright*, El., Bl. & El. 746; S. C., 29 L. J., Q. B. 43; 8 W. R. 160. And previous insanity and confinement in a lunatic asylum constitute no excuse for non-performance of a promise of marriage. *Baker v. Cartwright*, 10 C. B. (N. S.) 124; S. C., 30 L. J., C. P. 364. A rape, wholly without the fault of the woman, would discharge the man from his obligation. And it has also been said, that if a widow conceals her previous marriage, and betroths herself as a virgin, this would be a fraud and would avoid the contract. 2 Pars. on Cont. 67, citing Add. on Cont. 581, 584. If any man has been paying his addresses to one that he supposes a modest person, and afterward discovers her to be loose and immodest, he is justified in breaking any promise of marriage he may have made to her. *Butler v. Eschleman*, 18 Ill. 44; *Berry v. Bakeman*, 44 Me. 164; *Bell v. Eaton*, 28 Ind. 468; *Capehart v. Carradine*, 4 Strobb. (S. C.) 42. Though it is otherwise if he made the engagement knowing her to be a loose and immodest woman, or if she afterward prostituted her person to another man, with his connivance. *Irving v. Greenwood*, 1 C. & P. 350; *Johnson v. Smith*, 3 Pittsb. (Penn.) 184. And mutual improprieties and lewdness between parties betrothed, should not be allowed to bar the woman's right of action for a breach of promise of marriage, or be received either in mitigation or aggravation of damages. Ib. This subject will be fully considered in treating of defenses, and of marriage.

§ 7. Abandonment of contract to marry. The engagement to marry may be dissolved by mutual consent, at any time before the contract is carried into effect by the performance of the marriage ceremony. *King v. Gillett*, 7 M. & W. 55. See *Grant v. Willey*, 101 Mass. 356. And where the plaintiff was induced by the false statements of a third person to write a letter to the defendant discarding him, and releasing him from his promise to marry her, which letter was received, and in good faith acted upon by him, he having had no knowledge of its fraudulent procurement from her, she is not entitled to recover in an action for an alleged breach of such promise. *Allard v. Smith*, 2 Metc. (Ky.) 297. See *Davis v. Bomford*, 6 H. & N. 245; S. C., 30 L. J., Exch. 139.

§ 8. Who may maintain action for breach of promise. It has

long been settled law, that where the promise to marry is mutual, an action for a breach of the contract may be maintained by a man against the woman, as well as by the woman against a man. *Harrison v. Cage*, 1 Ld. Raym. 386; S. C., 1 Salk. 24. And although a promise of marriage by an infant is not binding, and an action for the breach thereof cannot be maintained against an infant, yet, it is well settled that an infant may maintain such an action against the adult. *Holt v. Ward*, 2 Strange, 937; *Pool v. Pratt*, 1 D. Chip. (Vt.) 252; *Hunt v. Peake*, 5 Cow. 475. A single woman, to whom a married man represents that he is single, and promises marriage, may maintain an action against him for the breach of his promise. *Blattmacher v. Saal*, 29 Barb. 22; S. C., 7 Abb. 409; *ante*, 725, § 5. And this, notwithstanding the fact that she afterward became aware of his marriage, and did not repudiate her contract, but still agreed to marry him when she should be able to by reason of an expected separation from his wife. *Covver v. Davenport*, 1 Heisk. (Tenn.) 368.

The promise to marry being essentially personal in its nature, the common-law maxim *actio personalis moritur cum persona*, is regarded as applicable to the action for its breach. The personal representative of the injured party cannot, therefore, bring the action, unless, perhaps, special damage is alleged and proved. *Chamberlain v. Williamson*, 2 Maule & Selw. 408. Nor can the action be revived against the executors or administrators of the promisor. *Smith v. Sherman*, 4 Cush. (Mass.) 408; *Wade v. Kalbfleisch*, 58 N. Y. (13 Sick.) 282; *Latimore v. Simmons*, 13 Serg. & Rawle (Penn.), 183.

§ 9. **Damages in action for.** In action for a breach of promise of marriage, damages cannot be measured by a known standard, as in commercial cases, but the amount is peculiarly a question for the jury. *Berry v. Da Costa*, L. R., 1 C. P. 331; S. C., 1 H. & R. 291. And the courts are very unwilling to set aside a verdict in these cases, on the ground of excessive damages. *Smith v. Woodfine*, 1 C. B. (N. S.) 660; *Southard v. Rexford*, 6 Cow. 254. The law allows punitive or vindictive damages to be assessed by the jury. *ib.*; *Johnson v. Jenkins*, 24 N. Y. (10 Smith) 252; *Thorn v. Knapp*, 42 N. Y. (3 Hand) 474; S. C., 1 Am. R. 561. And all the circumstances attending the breach, before, at the time, and after, may be given in evidence in aggravation of damages. *Baldy v. Stratton*, 11 Penn. St. 316; *Tubbs v. Van Kleeck*, 12 Ill. 446; *Wade v. Kalbfleisch*, 58 N. Y. (13 Sick.) 282, 285; *Reed v. Clark*, 47 Cal. 194. Thus, the plaintiff

may, for the purpose of enhancing damages, prove that she announced the fact of her engagement to her friends, and invited them to attend the wedding. *Ib.* So, the length of time a marriage engagement existed is a proper element of damage for the breach thereof. *Grant v. Willey*, 101 Mass. 356. A defense to an action for a breach of promise, that the plaintiff is unchaste, if not established by proof upon the trial, should be considered by the jury in aggravation of damages. *Southard v. Rexford*, 6 Cow. 654; *Davis v. Slagle*, 27 Mo. 600. But it is held in a recent case, that such a defense, though unsuccessful, ought not, *per se*, to aggravate the damages, unless interposed in bad faith, from malice, wantonness, or recklessness. *Powers v. Wheatly*, 45 Cal. 113. See *Simpson v. Black*, 27 Wis. 206; *Thompkins v. Wadley*, 3 N. Y. S. C. (T. & C.) 424. That seduction may be proved in aggravation of damages, in an action for breach of promise to marry, has been held in some cases. See *Sheahan v. Barry*, 27 Mich. 217; *Paul v. Frazier*, 3 Mass. 73; *Sherman v. Rawson*, 102 id. 395; *Espy v. Jones*, 37 Ala. 379; *Fidler v. McKinley*, 21 Ill. 308; *Kelly v. Riley*, 106 id. 339; S. C., 8 Am. R. 336; *Matthews v. Cribbett*, 11 Ohio St. 330. While it has been questioned or denied in other cases. See *Cates v. McKinney*, 48 Ind. 562; S. C., 17 Am. R. 768; *Baldy v. Stratton*, 11 Penn. St. 316; *Perkins v. Hersey*, 1 R. I. 493; *Burks v. Shain*, 2 Bibb (Ky.), 341. It would seem to be settled, however, that where, by statute, a woman has a right of action for her own seduction, such seduction cannot be given in evidence in an action by her for breach of promise of marriage, to enhance the damages, unless it is alleged in the pleading. *Cates v. McKinney*, 48 Ind. 562. See *Lindley v. Dempsey*, 45 id. 246.

An instruction to the jury in an action for a breach of promise, that if they find for the plaintiff they should award her such damages as would place her in as good a condition pecuniarily as she would have been in if the contract had been fulfilled, has been held unobjectionable. *Lawrence v. Cooke*, 56 Me. 187, 195. But in *Miller v. Rosier*, 31 Mich. 475, such an instruction was held to be altogether too complicated and conjectural in its elements to be of service as a guide to the jury.

The jury cannot take into consideration any damages sustained by the plaintiff, by reports raised since the commencement of the action. *Greenup v. Stoker*, 7 Ill. 688. And unless special damages are averred and stated, proof of damage to the health of the plaintiff, as a consequence of the breach of promise to marry, is inadmissible. *Bedell v. Powell*, 13 Barb. 183.

CHAPTER XXXI.

BRIDGES.

ARTICLE I.

OF THE GENERAL RULES OF LAW RELATING TO BRIDGES.

Section 1. Definition of. A bridge, as known to the common law, was a structure over a river or other stream of water, having a foot-path for man and beast. *Proprietors of Bridges v. Hoboken Land Co.*, 13 N. J. Eq. 504. But it was held not essential to a bridge, in the legal sense of the word, that it should be a structure over water which flows at all times. *Reg. v. Derbyshire*, 2 Q. B. 745; S. C., 2 G. & D. 97. As now used, the term "bridges" is one of comprehensive scope, and is defined as a "structure erected over a river, creek, stream, ditch, ravine or other place, to facilitate the passage thereof; including by the term both arches and abutments." 1 Bouv. Dict. 222. And see *Board of Chosen Freeholders v. Strader*, 18 N. J. (Law) 108; *Enfield Toll-Bridge Co. v. Hartford & New Haven Railway Co.*, 17 Conn. 56. It is held, however, that the crossing of a river by a railroad track on piers is not a bridge within the meaning of a previous charter which makes the erection of any other bridge or bridges unlawful. *Lake v. Virginia, etc., R. R. Co.*, 7 Nev. 294; *McLeod v. Savannah, etc., R. R. Co.*, 25 Ga. 445; *Bridge Co. v. Hoboken Land Improvement Co.*, 10 N. J. 81; S. C. affirmed, 1 Wall. (U. S.) 116; *Thompson v. N. Y. & Harlem R. R. Co.*, 3 Sandf. Ch. (N. Y.) 625.

Bridges are either public or private. A *private* bridge is one constructed for the use of one or more private persons; and it is none the less a private bridge, although it may be occasionally used by the public. *King v. Inhabitants of Bucks*, 12 East, 203. A *public* bridge is one that forms a part of the highway, and is common, according to its character, as a foot, horse, or carriage bridge, to the public generally, with or without toll. *Rex v. Inhabitants, etc., of Yorkshire*, 2 East, 342; 1 Bouv. Dict. 222. A bridge may be a public bridge which is used by the public only at such times as are dangerous to pass through the stream. *Rex v. Northampton*, 2 M. & S. 262. And it is

held that a bridge used only on occasion of floods, and lying out of and alongside the road commonly used, is a public bridge. *Rex v. Deon*, R. & M. 144. A public bridge being regarded as a highway, the principles of the common law applicable to the latter is, in general, applicable to the former.

§ 2. *How established.* Public bridges may be established by legislative authority, or by dedication. Congress has the constitutional power to legalize a bridge. *Clinton Bridge*, 10 Wall. 454; and the legislative power of a State to authorize the erection of a public bridge is undoubted. See *Harrell v. Ellsworth*, 17 Ala. 576; *Flanagan v. Philadelphia*, 42 Penn. St. 219; *Erie City v. Swingle*, 22 id. 384; *Jones v. Keith*, 37 Tex. 394; *Wright v. Nagle*, 48 Ga. 367; *Strong v. Dunlap*, 10 Humph. (Tenn.) 423; *Piscataqua Bridge Co. v. N. H. Bridge Co.*, 7 N. H. 35; *Rogers v. Kennebec & Portland R. R. Co.*, 35 Me. 319; *Wisconsin River Improvement Co. v. Lyons*, 30 Wis. 61. And there are three cases in which authority from the legislature is necessary to erect a bridge over a stream: First. Where the stream is navigable. Second. Where the State owns the bed of the stream. Third. Where the right to take tolls is desired. *Fort Plain Bridge Company v. Smith*, 30 N. Y. (3 Tiff.) 44, 63. The power of erecting a bridge, and taking tolls thereon, over a navigable river forming the conterminous boundary between two States, can only be conferred by the concurrent legislation of both States. *President, etc., v. Trenton Bridge Co.*, 13 N. J. Eq. 46; *Dover v. Portsmouth Bridge*, 17 N. H. 200; *Middle Bridge Corporation v. Marks*, 13 Me. 326.

Although a State has the right to authorize the construction of a bridge over a navigable river within its own limits, yet the power conferred must be so exercised, that no more injury may be done to the rights of others than is necessary to accomplish the purpose for which it is granted. Care must be taken to interrupt navigation as little as possible. *State v. Inhabitants of Freeport*, 43 Me. 198; and for any unnecessary interruption the proprietors of the bridge will be held liable in damages, or the bridge may be abated as a nuisance, by injunction. See *Reg. v. Betts*, 22 Eng. Law & Eq. 240; *Renwick v. Morris*, 3 Hill (N. Y.), 621; S. C. affirmed, 7 id. 575; *Blanchard v. Western Union Tel. Co.*, 60 N. Y. (15 Sick.) 510, 515; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518; *Devoe v. Penrose Ferry Co.*, 5 Penn. Law J. R. 313.

The legislature of a State may authorize the erection of a new

bridge, so near an older one as to impair or destroy the value of the latter, without compensation, unless the older franchise be protected by the terms of its grant. *Charles River Bridge Co. v. Warren Bridge*, 11 Pet. 420; 7 Pick. (Mass.) 344; *Turner v. Peck*, 1 Barb. Ch. (N. Y.) 549. See *Parrott v. City of Lawrence*, 2 Dill. 332. But a new bridge so erected, unless authorized by statute, is unlawful, and may be enjoined as a nuisance. And if the older franchise vested in an individual or private corporation, be protected, or be exclusive within given limits, by the terms of its grant, the erection of a new bridge, even under legislative authority, is unconstitutional, as an act impairing the obligation of a contract. *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 101, 111; *Chenango Bridge Co. v. Lewis*, 63 Barb. 111; *Dyer v. Tuscaloosa Bridge Co.*, 2 Port. (Ala.) 296; *Hartford Bridge Co. v. East Hartford*, 18 Conn. 53; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35. See *Tripp v. Frank*, 4 T. R. 666.

As to bridges established by dedication, see the subject of Highways, where the principles applicable to the dedication of both will be found fully stated. It may be remarked, however, that in the case of bridges their acceptance will not be presumed from mere use, until they are proved to be of public utility. *Williams v. Cummington*, 18 Pick. (Mass.) 312; *Dyger v. Schenck*, 23 Wend. 446; *Rex v. Inhabitants, etc., of Yorkshire*, 2 East, 342. See *Requea v. City of Rochester*, 45 N. Y. 129; S. C., 6 Am. R. 52.

§ 3. **Reparation of bridges.** In England, by the common law, counties are chargeable with the repair of all public bridges, whether foot, horse or carriage bridges, unless they can show that other persons are bound to repair particular bridges. *Rex v. W. R. of Yorkshire*, 2 East, 342; *Rex v. Salop*, 13 id. 95; *Reg. v. Southampton*, 14 Eng. Law & Eq. 116. In this country, the duty of repairing bridges is regulated by statute in the different States, and the burden is generally imposed upon towns or counties. See *Norwich v. Commissioners*, 13 Pick. (Mass.) 60; *Bardwell v. Jamaica*, 15 Vt. 438; *State v. Boscawen*, 8 Fost. (N. H.) 195; *Hill v. Supervisors of Livingston*, 12 N. Y. (2 Kern.) 52. But bridges owned by corporations or individuals are repairable by their proprietors. *Heacock v. Sherman*, 14 Wend. 58; *Commonwealth v. Newburyport Bridge*, 9 Pick. (Mass.) 142. See *Brookins v. Central R. R. and Banking Co.*, 48 Ga. 523. So the individual or corporation, for whose exclusive benefit a bridge

is made over a highway, must keep it in repair, and is liable for injuries caused to third persons in consequence of its being out of repair. *Dygert v. Schenck*, 23 Wend. 446; *Heacock v. Sherman*, 14 id. 58; *Perley v. Chandler*, 6 Mass. 453. But a bridge, though erected by individuals, yet if dedicated to the public, used by the public, and found to be of public utility, must be repaired by the public. *State v. Campton*, 2 N. H. 513.

• In Pennsylvania, it is held that in the absence of special obligation by prescription or legislative enactment, the duty of repairing public bridges falls on the public, either on the county, city, or borough, in which the bridge is erected. *Meadville v. Erie Canal Co.*, 18 Penn. St. 66. See *Broomall's Appeal*, 75 id. 173.

§ 4. Remedies for neglect to repair. In all cases, the parties chargeable with the repair of bridges are under an obligation to constantly keep them in such a state of repair, as renders them safe and convenient for the service required of them (*People v. Hillsdale, etc., Turnp. R. Co.*, 23 Wend. 254); and for a neglect of this duty, the parties render themselves liable to indictment. *People v. Cooper*, 6 Hill (N. Y.), 516; *Commonwealth v. Newburyport Bridge*, 9 Pick. (Mass.) 142; *State v. King*, 3 Ired. L. (N. C.) 411. See *State v. Seawell*, 3 Hawks (N. C.), 193. So, it has been held that they may be compelled to repair by mandamus. *Brander v. Chesterfield Justices*, 5 Call (Va.), 548; *People v. Supervisors of Dutchess*, 1 Hill (N. Y.), 50. See *People v. Dutchess & Columbia R. R. Co.*, 58 N. Y. (13 Sick.) 152. But see *Reg. v. Trustees, etc.*, 12 Ad. & El. 427. And if the duty to repair be imposed by charter upon a corporation, it may be proceeded against for neglect by *quo warranto* for the forfeiture of its franchise. *People v. Hillsdale, etc., Turnp. R. Co.*, 23 Wend. 254. Or damages may be recovered against it in an action in favor of any person sustaining special injury from the neglect (*Townsend v. Susquehanna Turnpike*, 6 Johns. 90; *Williams v. Turnpike Corporation*, 4 Pick. [Mass.] 341); and in many of the States a similar action is given by statute against public bodies chargeable with the repairs. See *Farnum v. Concord*, 2 N. H. 392; *Chidsey v. Canton*, 17 Conn. 475; *Kelsey v. Glover*, 15 Vt. 708; *Sawyer v. Northfield*, 7 Cush. (Mass.) 490.

In an action for damages arising from a defect in a bridge, exemplary damages may be given, in case the defendants have been guilty of gross negligence. *Whipple v. Walpole*, 10 N. H. 130.

Where the owner of land over which a public road passes,

digs a race-way across the road, and builds a bridge over it, he is liable for damages arising from the imperfection of the bridge. *Dyert v. Schenck*, 23 Wend. 446. But the owner of a private bridge is not liable for injuries to a person crossing it, to whom the owner had given no special right to pass, or to have it kept in repair. *Louisville, etc., Canal Co. v. Murphy*, 9 Bush (Ky.), 522. A bond given to build a bridge and keep it in repair a given time will bind the obligor to rebuild, if the bridge be washed away even by an extraordinary flood in such time. *Gathwright v. Callaway Co.*, 10 Mo. 663.

A bridge erected by a volunteer in a highway, where it was needed, becomes the property of the municipality where it is allowed to remain for years, and should be kept in repair by such municipality. *Requea v. City of Rochester*, 45 N. Y. (8 Hand) 52; S. C., 6 Am. Rep. 52. And if a traveler is injured, without fault on his part, in consequence of the removal of planks by unknown persons, the city, being bound to keep the bridge in repair, will be liable although no actual notice of the defect is given, sufficient time having elapsed to render the condition of the bridge notorious. *Ib.*

§ 5. **Toll-bridges.** A toll-bridge, built in pursuance of an act of the legislature, is a public highway: *Thompson v. Matthews*, 2 Edw. (N. Y.) 212. And a State legislature has authority to grant, by charter, an exclusive right to erect a bridge and take tolls, and such a charter, if granted without reservation or qualification, is a contract within the provision of the constitution of the United States, prohibiting State laws to impair the obligation of contracts. *Binghamton Bridge*, 3 Wall. (U. S.) 51; reversing S. C., 27 N. Y. (13 Smith) 87; 26 How. (N. Y.) 124. And see cases cited, *ante*, § 2. It is immaterial whether the instrument by which the public faith is pledged, is in terms a contract or in form a mere legislative enactment; in either case it is equally a contract within the meaning of the constitution. *Bridge Co. v. Hoboken, etc., Co.*, 13 N. J. Eq. 81. And where one has a grant of a bridge, with the exclusive right of taking toll, the erection of another bridge so near it as to materially affect or take away its custom, is a nuisance; and the court will grant an injunction to protect the enjoyment of the franchise. *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 101; *Mayor, etc., of N. Y. v. N. Y. & Staten Island Ferry Co.*, 49 How. (N. Y.) 250; *Smith v. Hawkins*, 3 Ired. Eq. (N. C.) 613. But it is held, that such franchise is not interfered with by a legislative

grant of a right to build a railroad bridge. *McLeod v. Savannah, etc., R. R. Co.*, 25 Ga. 445; *Lake v. Virginia, etc., R. R. Co.*, 7 Nev. 294. And a franchise to erect a bridge and take tolls, being property, may be taken for public use, like other property, if adequate compensation is made to the proprietor. *Piscataqua Bridge Co. v. New Hampshire Bridge*, 7 N. H. 35. And see *Jones v. Keith*, 37 Texas, 394.

The payment of tolls can be lawfully enforced only at the gate or toll-house. *State v. Dearborn*, 15 Me. 402. And where a charter granting the right to erect a toll-bridge requires that the rates of toll shall constantly be kept exposed to the view of passengers at the place where the tolls are collected, no action can be maintained for the recovery of the penalty, for forcibly passing the bridge without paying toll, unless the corporation has complied with this requirement. *Middle Bridge v. Brooks*, 13 Me. 391. And see *Bonham v. Taylor*, 10 Ohio, 108; *Worcester v. Essex Merrimac Bridge*, 7 Gray (Mass.), 457. A bridge company may bind themselves by a contract to permit certain persons to pass their bridge free of toll. *Central Bridge Co. v. Sleeper*, 8 Cush. (Mass.) 324; *Same v. Bailey*, id. 319. And such exemption may exist by a provision of the charter of a bridge company; in which case the exemption is to be liberally construed. *Railroad Company v. Jones*, 4 Rich. Eq. (S. C.) 459; *Wooster v. Van Vechten*, 10 Johns. 467; *Salmon v. Mallett*, 2 Murph. (N. C.) 372; *Cayuga Bridge Co. v. Stout*, 7 Cow. 33.

In the absence of any special provision in the charters of toll-bridge corporations, there seems to be no essential difference between the obligations and liabilities resting upon them and those of a town charged with the maintenance of a bridge. *Orcutt v. Kittery Point Bridge Co.*, 53 Me. 500. See *State v. Turnpike Co.*, 16 Ohio St. 308; *Chase v. Bridge Co.*, 6 Allen (Mass.), 512. They are bound to use at least ordinary care and diligence in the construction of the bridge, and in keeping it in proper order. *Bridge Co. v. Williams*, 9 Dana (Ky.), 403; *Grigsby v. Chappell*, 5 Rich. (S. C.) 443. And the mere opinion and belief of the proprietors of the bridge that it is safe will not excuse them from liability for injuries arising from its defects; they should avail themselves of the judgment of such as are disinterested, skillful, and experienced in such matters. *Bridge Co. v. Williams*, 9 Dana (Ky.), 403. See *Stack v. Banks*, 6 Lans. (N. Y.) 262; *Rapho v. Moore*, 68 Penn. St. 404.

While the proprietor of a toll-bridge is making needful repairs,

and part of the flooring is off, and timbers out of their usual place, but in plain sight, and the collection of toll discontinued, he is not liable to one who, in attempting to cross on planks laid down for the workmen's use, falls through and is injured. *Tift v. Jones*, 52 Ga. 538 So, toll-bridge corporations are not bound to erect and maintain railings upon their bridges for passengers to lean against or rest upon while they stop to recover from fatigue. And, if a person uses them for such purpose, he does it at his own risk. *Orcutt v. Kittler Point Bridge Co.*, 53 Me. 500.

The owners of a steamboat, licensed to run on a navigable river, notified the owners of a railroad bridge, crossing the river, to make a draw in their bridge as required by their charter. Some time afterward, the owners of the boat arriving with it at the bridge, and not being able to pass, no draw having been made, tore down part of the bridge and passed. This was held a lawful abatement of a nuisance. *State v. Parrott*, 71 N. C. 311; S. C., 17 Am. R. 5.

CHAPTER XXXII.

CANALS.

ARTICLE I.

GENERAL RULES OF LAW RELATING TO CANALS.

Section 1. Definition. A canal is defined as "an artificial cut or trench in the earth for conducting and confining water to be used for transportation." 1 Bouv. Dict. 236. The importance of canals, as a means of inland navigation, has attracted attention from the earliest times. They were known in Egypt at a very early period, and modern nations have been prompt in availing themselves of the advantages to be derived from their construction and use. When constructed by public authority, they are, in law, regarded as public highways, with the right of tolls attached. *Rogers v. Bradshaw*, 20 Johns. 735; *Riddle v. Proprietors of Locks, etc.*, 7 Mass. 169; *Commonwealth v. Fisher*, 1 Penn. 462; *Cooper v. Williams*, 4 Ham. (Ohio) 253; *Rex v. Kent*, 13 East, 220; *Rex v. Chelsea Water Works*, 5 B. & Ald. 156. Canal-boats are held not to be within the description of "vessels of the United States," mortgages of which are declared by act of Congress to be void, unless recorded in the office of the collector of customs, where such vessels are registered or enrolled. And there is no law which requires canal-boats to be registered in the collector's office of the United States. *Hicks v. Williams*, 17 Barb. 523.

§ 2. **Construction and management of.** Public canals are constructed and managed under the provisions of statutes and charters enacted for the purpose. In this country they are constructed and managed either by the State itself, acting through the agency of commissioners, or they are wholly controlled by incorporated companies. In either case, private property may be taken for the construction of the canals, but a strict compliance with the statute authorizing such taking is required. See *Farnum v. Blackstone Canal Corp.*, 1 Sumn. 46; *Binney v. Chesapeake & Ohio Canal Co.*, 8 Pet. 201. And the authority cannot be delegated, unless there be special power of substitution. *Lyon v. Jerome*, 26 Wend. 485; *St. Peter v. Denison*, 58 N. Y. (13 Sick.)

416. So, in general, where lands are thus taken, an easement only in the lands through which the canal is constructed is acquired. The land-owners retain the right to make any use of the land or water which does not interfere with the public purposes to which they have been appropriated. Hence, they are not liable to the proprietors of the canal for damages for cutting ice for sale in the canal. *Edgerton v. Huff*, 26 Ind. 35. See *Brinckerhoff v. Wemple*, 1 Wend. 474; *Western Penn. R. R. Co. v. Childs*, 3 Pittsb. (Penn.) 168. But, although the title remains in the original owner until he is paid therefor, he cannot sustain an action against the party taking the same for an injury thereto. *Ligat v. Commonwealth*, 19 Penn. St. 456; *Turrell v. Norman*, 19 Barb. 263. And the legislature have the exclusive power to determine when land may be taken for a canal or other public use, and the courts cannot review their determination in that respect. *Hankins v. Lawrence*, 8 Blackf. 266; *Harris v. Thompson*, 9 Barb. 350.

Twenty years' user of an opening in the bank of a canal to supply it with water from a swamp as a reserve, notwithstanding an occasional overflow, was held not sufficient to establish such a prescriptive right in the canal company as to entitle them so to increase, either intentionally or negligently, such outflow, as to cause the water to escape from the swamp and submerge the land of an adjacent proprietor. *Savannah, etc., Canal Co. v. Bourquin*, 51 Ga. 378. And it is held, that a canal company, having power under their charter to enlarge their canal and to take private property on making compensation, are liable to the owner of lands which are inundated and injured by such enlargement, though it is made with all reasonable care and skill. *Selden v. Delaware, etc., Canal Co.*, 24 Barb. 362. See *Chase v. Sutton Manuf. Co.*, 4 Cush. (Mass.) 152.

§ 3. **Keeping in repair.** As it regards the repair of a canal, a canal commissioner has two classes of duties imposed upon him; the duties of one class are imperative, while those of the other depend on his judgment and discretion. In cases where the duties are imperative and absolute, if he neglects them, he is responsible to any one who suffers from his neglect. *Griffith v. Follett*, 20 Barb. 620. It is incumbent upon him to examine such portion of the canal as is committed to his care, and to decide, from such examination, the necessity for any particular repair, and act accordingly. His duty to repair is imperative when there is an obstruction to navigation in the canal, or when

there is a breach in the banks rendering passage upon it difficult or impossible. *Ib.* See *Follett v. People*, 17 Barb. 193; S. C., 12 N. Y. (2 Kern.) 268; *French v. Donaldson*, 57 N. Y. (12 Sick) 496.

If a canal be built across a private road, the owner of the private road can compel the canal owners to bridge it. *Habersham v. Savannah, etc., Canal Co.*, 26 Ga. 665. But where a highway is laid out over a canal after its construction, the owners of the canal are under no obligation at common law, either to construct or maintain a bridge over the canal. *Morris Canal Co. v. State*, 4 Zab. (N. J.) 62. See *King v. Kerrison*, 3 M. & S. 526.

§ 4. Tolls. As it regards the right of the proprietors of canals to tolls, the rule is that they are entitled to take them, only as authorized by statute; and any ambiguity in the terms of the statute must operate in favor of the public. *Perrine v. Chesapeake, etc., Canal Co.*, 9 How. 172; *Myers v. Foster*, 6 Cow. 567; *Delaware, etc., Canal Co. v. Pennsylvania Coal Co.*, 21 Penn. St. 131; *Canal Co. v. Wheelley*, 2 B. & Ald. 792. Thus, a canal corporation, not having been empowered by its charter to demand tolls on passengers, or on vessels by reason of their passengers, cannot lawfully exact such tolls. *Perrine v. Chesapeake, etc., Canal Co.*, 9 How. 172.

The term "toll" does not necessarily import an immediate payment. As in other cases, the period of payment depends on the understanding of the parties. *Penn. Coal Co. v. Delaware, etc., Canal Co.*, 29 Barb. 589; S. C. affirmed, 3 Abb. Ct. App. 470; 1 Keyes, 72. In the absence of any thing to indicate a different intention, tolls are payable at the time the amount is ascertainable, without reference to the times of passage. *Ib.*

§ 5. Negligence. A company maintaining for their own profit a canal, open to the public for navigation on payment of tolls, are bound only to take reasonable care that it may be navigated without danger, and are not responsible for accidents which do not arise from the want of this reasonable care. They are not, like common carriers, subjected to the responsibility of insurers. *Lancaster Canal Co. v. Parnaby*, 11 Ad. & El. 223; *Exchange Fire Ins. Co. v. Delaware, etc., Canal Co.*, 10 Bosw. (N. Y.) 180; *Weitner v. Delaware, etc., Canal Co.*, 4 Rob. (N. Y.) 234.

§ 6. Liability of officers in charge. The rule of law is well settled, that a contractor employed by the State to put a canal in repair is liable to an individual who sustains special damages by reason of the contractor's neglect to perform his duty. *Ful-*

ton Ins. Co. v. Baldwin, 37 N. Y. (10 Tiff.) 648; *Conroy v. Gale*, 5 Lans. (N. Y.) 344; *Robinson v. Chamberlin*, 34 N. Y. (7 Tiff.) 389. And it is held that in order to render a canal contractor liable for damages resulting from defects in a canal bridge, it is not necessary to establish either that the bridge was so defective as to be apparently so to every body, or that notice of its defective and unsafe condition had been brought to the contractor or his agents. It is sufficient if it appears that the defects were such as the contractor might, by reasonable examination and tests, have discovered. *Stack v. Banks*, 6 Lans. (N. Y.) 262; *French v. Donaldson*, 57 N. Y. (12 Sick.) 496.

The superintendent of repairs on a canal, negligently allowing an obstacle to remain in the canal until he receives orders for its removal from the canal commissioners, is liable to parties whose boats are damaged by the obstacle. *Shepherd v. Lincoln*, 17 Wend. 250; *Adsit v. Brady*, 4 Hill (N. Y.), 630. And the fact that a boat owner was attempting to pass his boat through a canal on Sunday in violation of law will not prevent his recovery of damages occasioned by a break in the embankment resulting from the negligence of the servants of the canal company. *McArthur v. Green Bay, etc., Canal Co.*, 34 Wis. 139.

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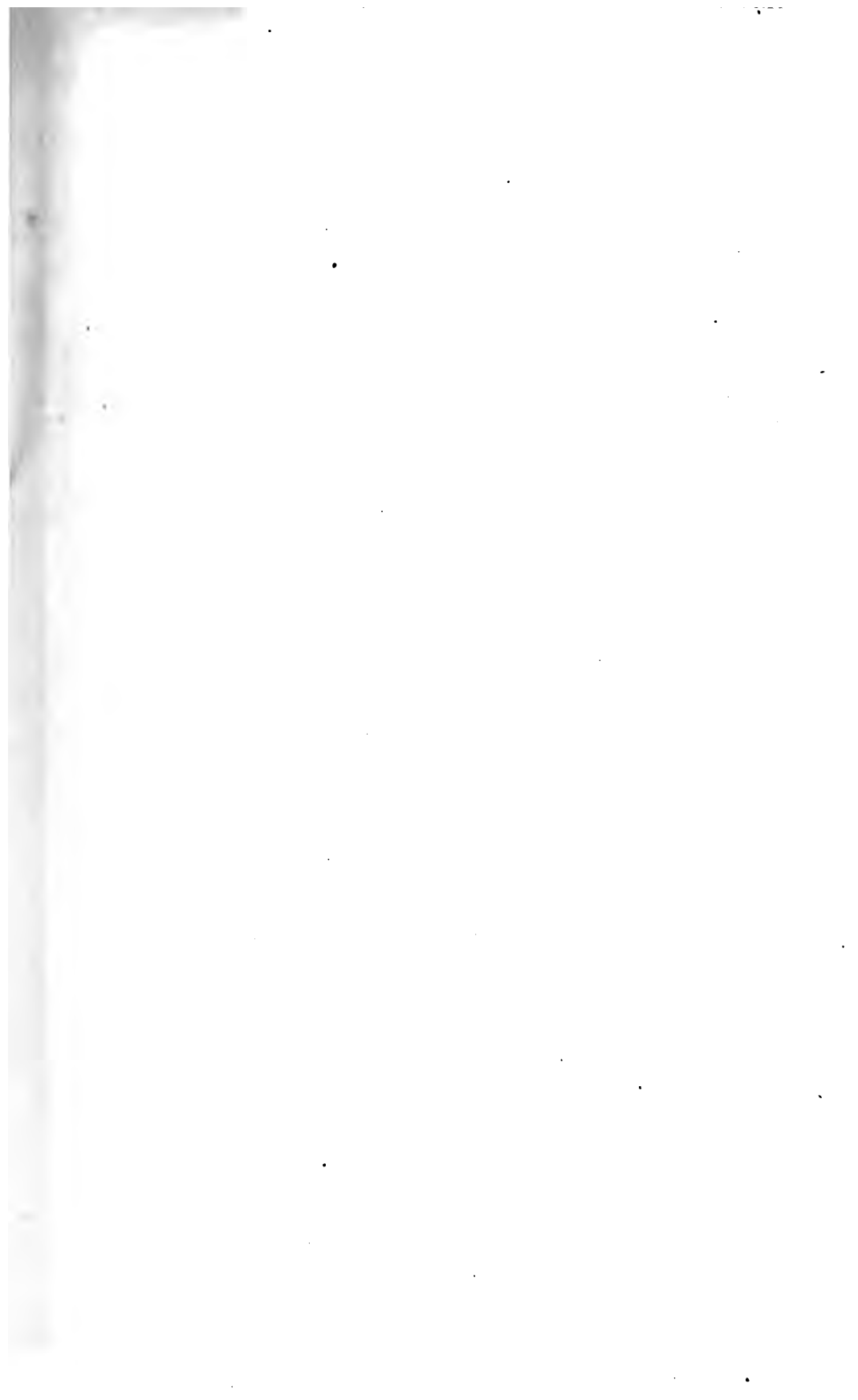
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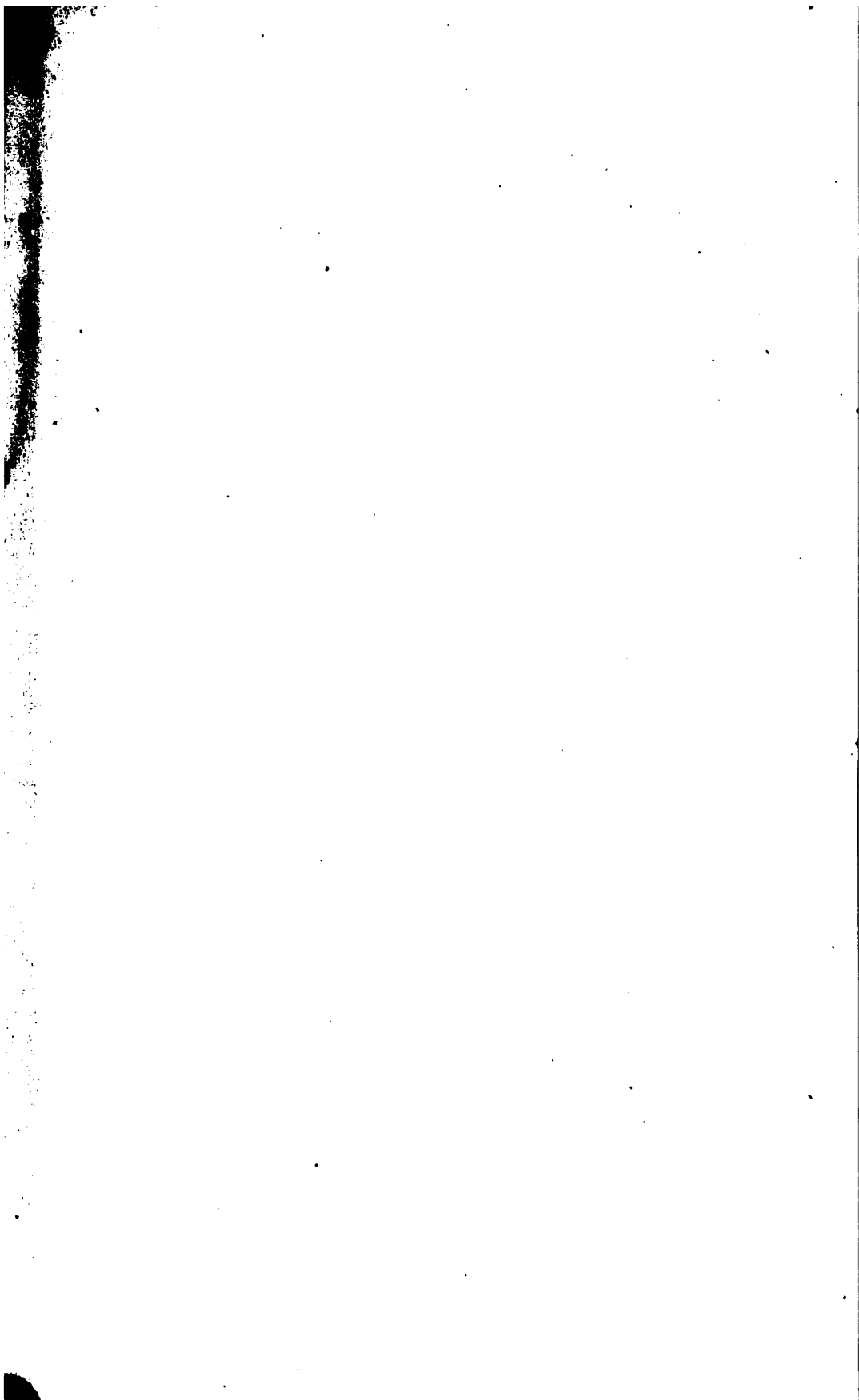
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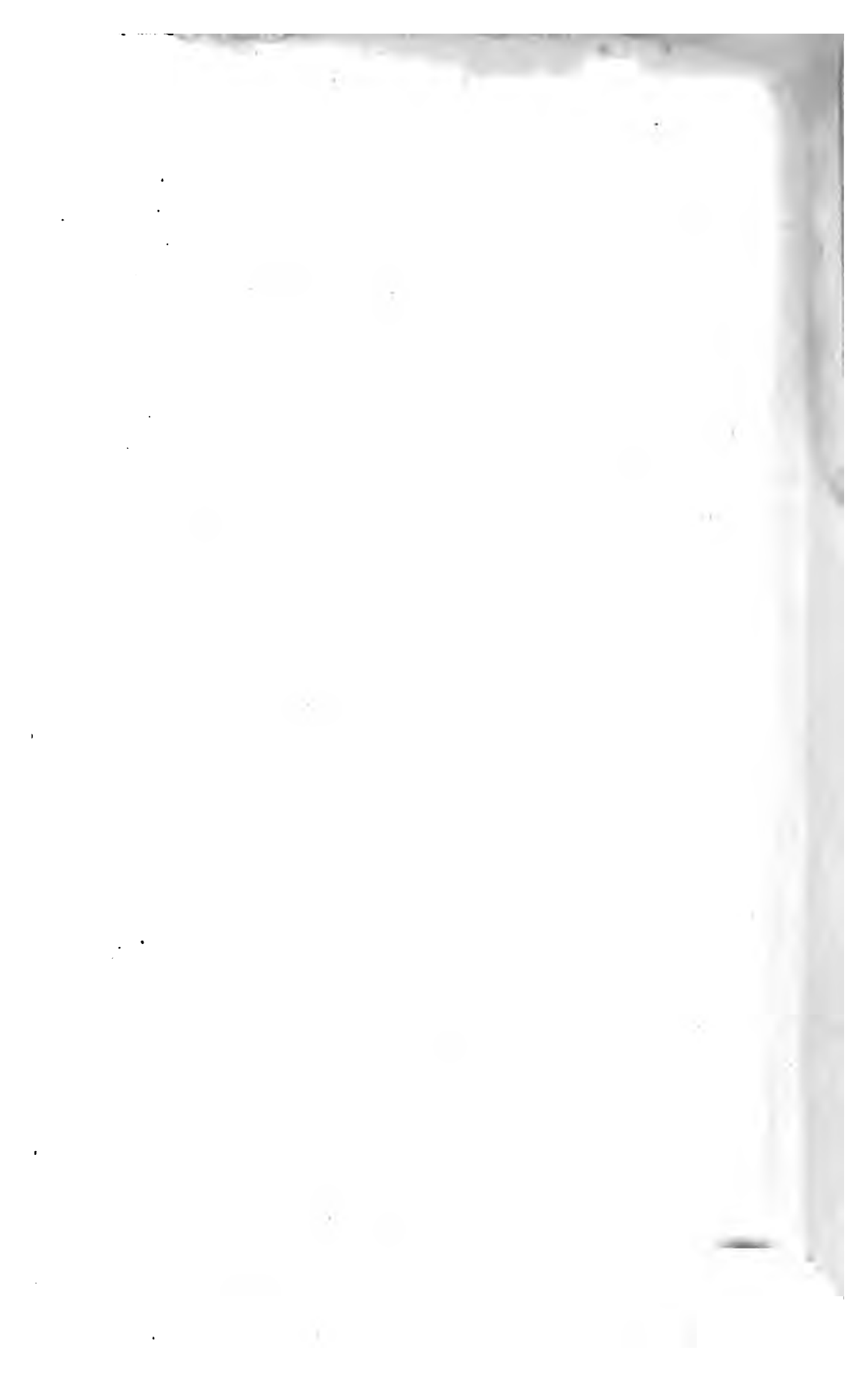
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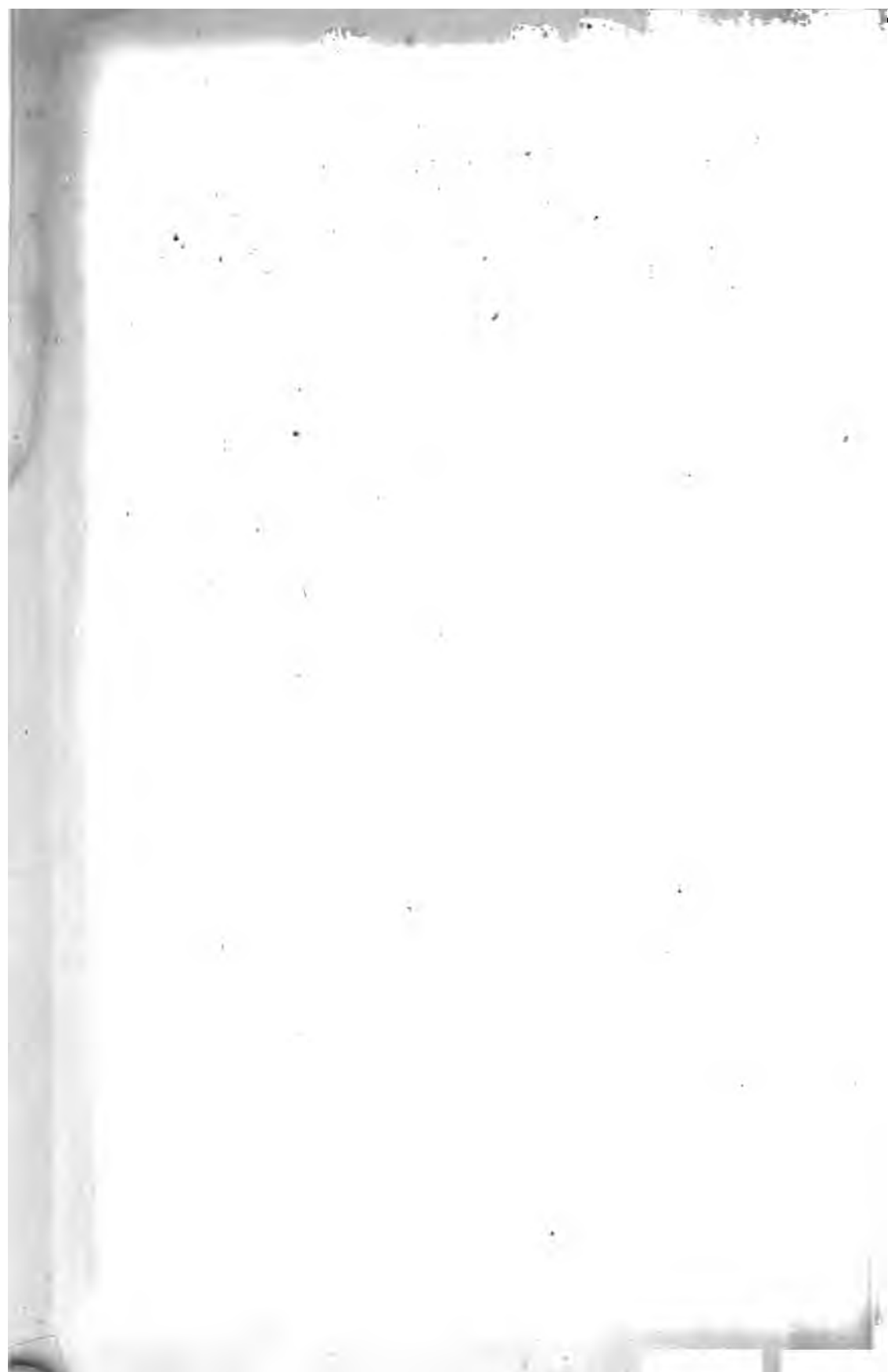
Page 4, line 18 from top, instead of "law" for the enforcement, etc., should read "courts" for the enforcement, etc.

Page 591, line 7 from bottom, should read "payees" instead of "payers," as it now stands.









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